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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-758

ROY VROOM,
Petitioner,

VERSUS

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HELMICK, CONOVER & BURKHARDT

FREDERIC K. CONOVER II

700 Denver Club Building
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October, 1973

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. ---------

ROY VROOM,
Petitioner,

VERSUS

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Roy Vroom respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on June 29, 1973.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. The appeal was a consolidation of two

appeals, one appealing from a final judgment initially entered in the United States District Court on May 11, 1972 and the other appealing from an order of the District Court entered on November 21, 1972 and denying a motion filed under Rule 60 (b) (5) of the Federal Rules of Civil Procedure to obtain relief from the judgment. The opinion of the United States District Court for Colorado appears at 342 F.Supp. 687 (D.Colo. 1972). The order of the United States District Court for Colorado entered on November 21, 1972 denying the Rule 60(b) (5) motion also appears in the appendix hereto.

JURISDICTION

The date of the judgment sought to be reviewed and the date of its entry is June 29, 1973. An order denying the rehearing was entered on August 17, 1973. This Court's jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

The U. S. District Court's judgment impressed a constructive trust upon certain shares of common stock owned by petitioner. However, the judgment also expressly conditioned the impression of the trust upon the tender of payment by respondents of the price of the stock within 30 days from the date the judgment became final. It was further decreed that if the tender was not so made the trust was released. Respondents failed to tender payment for at least 190 days after the judgment was entered. The District Court then refused to satisfy the

judgment on the grounds alleged by petitioner that the judgment and decree had been fully complied with by reason of the expiration of the 30 day period. The District Court ruled that it had been its intention that the constructive trust be imposed until 30 days after the judgment or order of the final court to which an appeal is taken. The Court of Appeals affirmed.

The questions then presented are:

1. Whether a judgment of a United States District Court becomes final for purposes of execution and enforcement ten days after its entry under Rule 62 of the Federal Rules of Civil Procedure if no supersedeas bond is filed, when the Court's judgment required Plaintiffs to tender payment for stock within thirty days from the date judgment became final.

2. Whether a United States District Court has the jurisdiction or power to modify the effect of its own judgment after the judgment has been automatically satisfied by its own terms.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Rule 62, Federal Rules of Civil Procedure. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Exceptions —Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its en-

try. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 69 (a), Federal Rules of Civil Procedure. Execution. In General.

(a) *In General.* Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the

judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Rule 70, Federal Rules of Civil Procedure. Judgment for Specific Acts; Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

STATEMENT OF THE CASE

Suit in this matter was brought in March 1971 to impress a constructive trust upon certain shares of stock in West End Development Company which had been purchased by petitioner Roy Vroom from former stockholders of the company. Respondents contended that the purchase by Vroom violated certain provisions of the corporation's Articles of Incorporation pertaining to restrictions on transfer.

The District Court impressed a constructive trust upon the shares of stock which were purchased by petitioner Roy Vroom, but the trust so impressed was conditioned upon the tender of payment of the price of the stock by respondents within thirty days from the date the judgment became final. It was further decreed that, if the tender was not made within that period of time, the trust was released.

The District Court's judgment and decree was signed and entered on the docket on May 11, 1972. The automatic stay of execution provided for under Rule 62 of the Federal Rules of Civil Procedure expired on May 21, 1972. Thereafter, none of the respondents made a tender of payment of the price of the stock. Petitioner, on November 6, 1972, filed a motion under Rule 60 (b) (5) of the Federal Rules of Civil Procedure for an order granting relief from the District Court's final judgment on the grounds that the judgment and decree with respect to the constructive trust had been fully complied with by the parties. Petitioner maintained that no tender had been made within thirty days from the date judgment

became final, that the constructive trust had thereby been released and that there had, accordingly, been a satisfaction of that judgment which had impressed the constructive trust upon petitioner's shares. The District Court held a hearing on this Rule 60 (b) (5) motion on November 20, 1972 and denied the motion. The District Court on November 20, 1972 contended that it had been its "intention" in May 1972 to impose a constructive trust "until thirty days after the judgment of or order of the final court to which an appeal is taken."

The denial of petitioner's Rule 60 (b) (5) motion was appealed to the Tenth Circuit Court of Appeals and the Court of Appeals upheld the ruling of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case raises an important question of interpretation of the Federal Rules of Civil Procedure. "The importance of the question in the administration of the Federal Rules of Civil Procedure," in conjunction with uncertainty among the courts of appeals, has been held sufficient reason for granting a writ of certiorari [Rule 53 (b)] *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed.2d 290, rehearing denied, 352 U.S. 1019, 77 S. Ct. 553, 1 L. Ed.2d 560. See also *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed.2d 721 (1958), [Rule 58 and former Rule 73 (a)] where "public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from judgments of District Court ac-

tions for money only tried without a jury" was held ample grounds for certiorari.

In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed.2d 1255 (1958), an important question as to the proper application of the Federal Rules of Civil Procedure was raised when the issue of whether a district court exceeded its power to dismiss a lawsuit under Rule 37 (b) of the Federal Rules of Civil Procedure was presented. Similarly, in this case, the issue of a district court's exceeding its own power by attempting to modify an earlier judgment is presented. Also see *Sears, Roebuck and Co. v. Mackey,* 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) where certiorari was granted to resolve a question as to finality and appealability of judgments under Rule 54 (b) of the Federal Rules of Civil Procedure.

2. The Tenth Circuit decision in the instant case is in conflict with previous decisions of the Fifth and Seventh Circuits. See *Sirloin Room, Inc. v. American Employers Insurance Co.,* 360 F.2d 160 (5th Cir. 1966) and *In Re Federal Facilities Realty Trust,* 227 F.2d 651 (7th Cir. 1955) both of which hold that judgment becomes final under Rule 62 (d) and former Rule 73 (d) of the Federal Rules of Civil Procedure for purposes of execution or enforcement of a judgment ten days after entry if no supersedeas is given.

3. While there are many pronouncements by the Supreme Court on the issue of "finality" for appeal or *res judicata,* the court has not spoken explicitly on the issue

of finality for execution and performance since *Hovey v. McDonald,* 109 U.S. 150 (1883), which pre-dates the present Federal Rules of Civil Procedure. The answer to this important question is currently uncertain and a Supreme Court ruling could instantly illuminate.

4. The Tenth Circuit ruling relies upon authority which deals with the issue of finality of judgments not for purposes of enforcement or execution but rather for purposes of appealability. 4 Am. Jur.2d *Appeal & Error,* § 363; *First National Bank of Dodge City v. Johnson County National Bank and Trust Company,* 331 F.2d 325 (10th Cir. 1964); *Weingartner v. Union Oil Company of California,* 431 F.2d 26 (9th Cir. 1970), cert. denied 400 U.S. 1000 (1970). The ruling, accordingly, misinterprets the (applicable) law, departs from accepted standards for judicial proceedings and seriously hinders the future administration of the law with respect to the enforcement of final judgments in federal court. Federal Rules of Civil Procedure 62, 69 and 70; *Heikkila v. Barber,* 164 F.Supp. 587 (N.D.Calif. 1958); *Van Huss v. Landsberg,* 262 F.Supp. 867 (W.D.Mo. 1967); *Marceletti and Son Construction Company v. Millcreek Township Sewer Authority,* 313 F.Supp. 920 (W.D. Pa., 1970).

5. Finally, neither the Court of Appeals nor the District Court applied the provisions of Rule 62 of the Federal Rules of Civil Procedure when such application was clearly warranted. This action so far departs from the accepted and usual course of judicial procedure as to warrant exercise of Supreme Court supervisory powers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

May 12, 1972

Marguerite IRWIN et al.,
Plaintiffs,

v.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, et al.
Defendants.

As Amended on Denial of Rehearing June 23, 1972

Shellman, Carney & Edwards, by Dwight K. Shellman, Jr., and William J. Carney, Aspen, Colo., for plaintiffs

Helmick, Conover & Burkhardt, by Frederic K. Conover, II, and Kenneth L. Keene, Jr., Denver, Colo., for defendants.

MEMORANDUM OPINION

WINNER, District Judge.

[APPENDIX]

The individual plaintiffs, all of whom are citizens of states other than Colorado, and all of whom are retired or soon to be retired Army nurses, are minority stockholders in West End Development Company, a Colorado corporation. They seek to enforce against Roy Vroom, a Colorado citizen, rights to purchase stock in that company worth more than $10,000.00. As stockholders, they bring a derivative action against Roy Vroom as president, director and dominant stockholder of the company to force him to repay a $15,000.00 salary to the company, and they ask other derivative relief to be discussed later. The story unfolds.[1]

In 1957, Marguerite Irwin and Ada Rock[2] came to Aspen on a vacation, and they looked into the possibility of purchasing a small lodge in the area to operate after their retirement from the Army. Defendant Roy Vroom (in partnership with his brother, Jacob Vroom) maintained a real estate office in Aspen, and the two visiting Army nurses chanced into the Vroom real estate office to inquire about the availability of a lodge which they might buy. Vroom touted them into a joint venture with his brother and himself to purchase about 30 acres of undeveloped real estate just outside Aspen. The land was bought from Friedl Pfeiffer for $45,000.00, with $18,000 to be paid at time of purchase and the balance to be paid over a ten year period. One-half of the downpayment was

1. Facts and conclusions contained in this opinion are facts found and conclusions made by the Court pursuant to the requirements of Rule 52.

2. Ada Rock is not a party to this case, presumably for the reason that she is a Colorado citizen, and her presence would destroy diversity of citizenship. She has a case pending in a Colorado state court.

to be put up by Marguerite Irwin, Ada Rock and June M. Lease, and the other half was to be paid by Vroom Realty and Theodore Gordon, but the total payments to be made by Vroom Realty and Gordon were $18,000.00 each. The interests were to be held:

Irwin,Rock and Lease, collectively	20%
Vroom Realty	40%
Gordon	40%

To come up with $7,500 of their $9,000.00 share of the downpayment, with prior approval of the other investors being obtained, Vroom Realty and Gordon sold a 5% interest to Julia Crowley (nee Graves) and another 5% interest to Lois McCaleb.

A joint venture or syndicate agreement was entered into which provided in material part:

> "No party may sell or assign his interest herein or any fractional portion thereof without first offering his interest or fractional portion to the other parties, in writing, and allowing them, or any one of them, 15 days to meet his price, in cash, the name of the proposed purchaser being disclosed. No party shall thereafter sell his interest or any fractional portion thereof to anyone at less than the above offered price. Otherwise the interests or any fractional portion thereof shall be freely assignable."

Prior to consummation of the the purchase of the land, Vroom Realty assigned 10% of the deal to Ewing R. Taylor, Jr. and his wife, Ann Turlock Taylor, for $10,000.00, and again, notices were sent to the other investors in accordance with the quoted provision of the

syndicate agreement. In 1960, Vroom Realty borrowed $8,000.00 from Mr. and Mrs. Taylor and a 10% interest in the syndicate was put up as collateral for the loan. When the loan was not repaid, an outright conveyance of the pledged 10% interest was made to the Taylors.

In 1961, a disagreement arose between the Vrooms and Gordon, and Roy Vroom recommended to the other investors that an informal partition of the property be approved. At that time, Gordon owned a 35% interest in the venture [his original 40% less his share of the interest sold to Crowley and McCaleb.] By his letter of March 9, 1961, Roy Vroom told the other investors of the dispute and of his recommendations. He said:

> "As we (my brother and I) have declared in the past, we have pledged to advise you of any significant development effecting the property. (sic) In the interest of unanimity we would appreciate your approval by signing and returning this letter to my office."

All of the investors approved, and 10 and a fraction acres were conveyed to Gordon to terminate his relationship with the venture.

At about this time, the partnership of Roy Vroom and Jacob Vroom came to an end, and in 1962, the Vroom Realty interest in the venture was transferred to Roy Vroom in settlement of the partnership accounts. No notice of this transfer was given to the other investors. This was at about the same time that Roy Vroom's then attorneys were worried about title problems in event of a sale of the real estate owned by the joint venture, and

they recommended that the syndicate be incorporated to permit easier conveyance of marketable title. All participants in the venture approved this recommendation, and West End Development Company was incorporated on August 21, 1963, to take over for the joint venture, with stock being issued in accordance with the individuals' percentage ownership of the syndicate. As will be seen before this opinion is concluded, three paragraphs of the Articles of Incorporation are of importance to the resolution of this lawsuit.

The objects and purposes of the corporation are set forth in Article III, Paragraph I:

> "To engage in and carry on the business of buying, leasing or otherwise acquiring real estate of every kind and description, to construct and erect, or contract for the construction or erection of buildings and structures in or upon any of said real estate for any uses and purposes; to own, hold, improve, develop, subdivide, maintain, operate, lease, sell or otherwise dispose of all or any of said real estate or any part thereof."

The restrictions on transfer (which Vroom testified in the course of his deposition received in evidence were intended to restate the restrictions contained in the joint venture agreement) appear in Article IV, paragraph 6:

> "No shareholder shall sell or transfer any outstanding shares of the capital stock issued by the corporation to such shareholder, excepting to the other shareholders, *in the proportion which the number of shares owned by each bears to the total shares out-*

standing, without the prior consent of the owners of at least two-thirds (2/3) of the shares entitled to vote at shareholders' meetings, subject, however, to Paragraph 7 of this Article." [Emphasis supplied]

Article VIII, Paragraph 1 has to do with contracts between the corporation and its officers or directors. It says:

"No contract or other transaction of the corporation with any other person, firm or corporation, or in which this corporation may be interested, shall be affected or invalidated by:

"(a) the fact that any one or more of the directors or officers of this corporation may be interested in, or is a director or officer of, any other corporation; or

"(b) the fact that any director or officer, individually or jointly with others, may be a party to, or may be interested in, any such contract or transaction. Each person who may become a director or officer of the corporation is hereby relieved from any liability that might otherwise arise by reason of his contracting with the corporation for the benefit of himself or any firm or corporation in which he may in any way be interested."

[1] Read literally, Article IV, Paragraph 6 of the Articles having to do with the sale of shares in the corporation is nonsensical. It says that the other shareholders have a right to share in the purchase of a selling

stockholder's stock "in the proportion which the number of shares owned by each *bears to the total shares outstanding.*" The impossibility of giving literal application to this provision may be illustrated by assuming a corporation with 100 shares outstanding owned 30 shares by A, 25 shares by B, 20 shares by C, 15 shares by D and 10 shares by E. If A wanted to sell his 30 shares, B would have a right to buy 7.5 shares, C would have a right to 6 shares, D could buy 4.5 shares and E could buy 3 shares —a total of 21 shares, and 9 shares would be left out in space. Obviously, the scrivener who drafted the articles meant to say "in the proportion which the number of shares owned by each *bears to the total shares not offered for sale.*" A court must interpret the articles in a way which will give them a reasonable meaning, and defendant Vroom testified that it was intended in the articles to carry forward the provisions of the syndicate agreement which made provisions for a workable result and for the result necessarily intended by the draftsman of the corporate articles.

With this interruption in our story we return to develop the facts occurring after incorporation of the venture. The Buttermilk ski area was started near the land, and it, coupled with the public's enthusiasm for skiing, caused the value of the land to skyrocket. Vroom, who was well aware of the land's value, made some attempt to buy the nurses' stock for $600 per share in 1965, and for $750 a share in 1967. The nurses had no knowledge of Aspen real estate values because their professional status resulted in duty assignments throughout the world, and they relied on and trusted Vroom to

manage the property and to advise them concerning its development or disposition. [Vroom freely admitted plaintiffs' trust and reliance on him.] Yet, although Vroom had suggested a $600 per share price to the uninformed, far distant nurses in 1965, on September 9 of that same year, he purchased the 30.76 shares owned by the Taylors for $31,536.00—a price per share of $1,025.22. The nurses were not notified of this purchase, and they were given no opportunity to participate therein. Vroom's explanation of his failure to tell them about the transaction was that he had never read the articles of incorporation. This explanation hardly comports with the notices he gave during the life of the syndicate and his admission that Article IV, Paragraph 6 of the Articles of Incorporation were intended to carry forward the provisions of the joint venture agreement. Nor is it easy to accept in light of his present insistence on literal enforcement of other provisions of the articles. His advice to plaintiff Lease two years later that her stock was then worth only $750.00 per share does little to add credence to Vroom's claims, and it is apparent that he not only did not give plaintiffs an opportunity to share in the purchase of the Taylor stock, but that he consciously concealed that stock purchase from them.

On August 22, 1967, Vroom wrote the nurses calling a special stockholders' meeting for September 6, 1967. In his letter he said that he wanted to develop a small portion of the company land as "a recreational facility consisting of tennis courts, swimming pools, club house, restaurants and related facilities." He assured them that "the property would be leased to either a group, who

would then finance and develop the facility, or to an individual such as myself . . . Of course, the property will be leased, based on a percentage of the current value of the property." It comes as no surprise to learn that none of the plaintiffs were able to leave their duty stations to attend the meeting, although Ada Rock did manage to be present. The minutes of meeting show nothing concerning details of the plan but they recite that "All parties were in accord with the proposed project and it was agreed that we would proceed as soon as the various details were finalized."

In 1968, Vroom's former attorneys resigned as directors of the company, and defendants Sabin and Powers, both employees of Vroom, replaced them as directors. The extent of Sabin's and Powers' knowledge of and participation in company affairs is dubious to say the least. Nothing much happened until April 15, 1969, when Vroom wrote the other stockholders saying that he was negotiating a sale or a lease for the development "of the acreage owned by West End Development Company." He said that there were three possibilities, (a) a sale of the land, (b) a lease of the land, or (c) a participation in the development whereby the company would contribute the land as its share of the development cost. Enclosed with this letter was a consent to be signed by the stockholders, but their consents were not forthcoming.

Vroom did negotiate with one David Hoffman to form a limited partnership to develop the entire property, and a draft of the proposed limited partnership agreement was drawn. It said that the entire property was to be developed as "a tennis and swim club, retail shop-

ping mall and residential community." The recited agreed value of the real estate was $30,000 per acre, and, although Vroom was at all times willing to sign the agreement, the deal fell through when Hoffman lost interest. Vroom was an avid tennis enthusiast who played four or five days a week, and his desires to play tennis were not to be frustrated by either Hoffman's loss of interest, the corporation's lack of money, or the nurses' failure to approve the plan. Accordingly, on June 4, 1969, the board of directors authorized "the West End Development Co. to proceed with the construction of a Tennis and Swim Club." The resolution provided:

> "... the funds necessary for the initial phases would be advanced by Roy Vroom, personally, until such time as other satisfactory arrangements can be made by financing through a lending institution or until the West End Development property is sold, leased, or a participation arrangement is made whereby West End Development Co. participates with a developer. At that time, Roy Vroom will be reimbursed, in full, together with interest at bank rates. *Should West End Development Co. elect to operate said facilities, in that event Roy Vroom will be reimbursed from the gross income derived from said operation,* prior to any distribution of profits or dividends made to the stockholders of the West End Development Co., plus interest . . . It was further agreed to renew the Exclusive Listing Agreement with Roy Vroom Realty." [Emphasis supplied]

Work on the tennis courts started and Vroom loaned

the corporation $39,216.91. The economic study to support the expenditure deserves quotation from the portion of Vroom's deposition offered by defendant:

"Q. Did you inquire into the economics of the tennis operations that were in existence in Aspen at that time"

"A. No.

"Q. Did you inquire into the economics of tennis clubs generally?

"A. Not specifically, any specific tennis club, per se. I had an idea of what they cost to build, and approximately how much income they would produce.

"Q. Where did you get those ideas?

"A. From what I had to pay for a tennis court to play on it, and from people that built tennis courts in the past as to what they paid for them.

"Q. People in the Aspen area who had built tennis courts?

"A. No, in Denver."

Testimony at time of trial demonstrated that the income projections were little more than doodling, and predictably, the tennis courts have lost money under the operation of West End Development Company. Of course, the resolution of June 4, 1969, said that if the company operated the courts, "Vroom will be reimbursed from the gross income derived from said operation," but that isn't the way it has worked out. Less than four mon-

ths after the June 4, 1969, resolution, another resolution signed by Vroom as president and Powers as secretary [Sabin did not sign these minutes] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security. The resolution said that "the purpose of the loan is to reimburse Roy Vroom for the advance of funds made by him to West End Development Company, plus interest at 9% per annum. Any funds remaining after Roy Vroom is paid in full will be used to improve the tennis club site further."

To the extent that the resolution commanded the repayment of Vroom's loan plus 9% interest, it was carried out, and Vroom was paid $42,345.15. [$39,216.81 principal plus $3,128.24 interest.] Not all of the remaining loan proceeds of $32,654.85 can be said to have been "used to improve the tennis club site further," because on March 23, 1970, Vroom and Powers voted [Sabin did not sign the minutes] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, and this by a corporation which was losing money according to its financial records and tax returns. The minutes of this meeting show that Vroom was paid, "as manager of the West End Development Company, Inc. affairs and the Aspen Racquet Club." It was agreed that "a salary of $15,000.00 per year be paid to Director Roy Vroom, *which salary shall be increased from time to time as the duties connected with the companies' activities increase.*" [The emphasis is added to emphasize that the company's ability to pay was the farthest thing from

Vroom's mind.] Of course, the nurses knew nothing of these shenanigans.

We backtrack a little in the telling of this sordid tale. By the spring of 1969, the nurses were becoming disenchanted with Vroom's lack of progress in selling the property and with the total absence of income being derived from their by then 12-year old investment. His reports to them over the years had been sporadic and uninformative, and Marguerite Irwin met Ada Rock in Aspen for the avowed purpose of employing an attorney to look into the matter and to find out what had been going on and to obtain legal advice as to what they could and should do. Although plaintiffs' professional skill is attested by the fact that no plaintiff is retiring from the Army at a rank lower than major, their continuing lack of business acumen is attested by a visit they made to Vroom's office before they consulted an attorney. He assured them that all was in order, and he persuaded them that because Aspen is a small town in which gossip travels rapidly, they should not talk to an Aspen attorney. [Vroom told them that such gossip would lessen the land's sales price.] Instead, and still innocently acting on their misplaced trust in Vroom, they followed his recommendation and consulted the Denver attorneys for West End Development Company. Those attorneys conferred with Irwin and Rock, and a member of the firm accepted appointment under a power of attorney which, among other things, said that he should do anything "required or desirable in connection with the following matters:

"1. The interpretation, enforcement, amendment,

modification, termination or cancellation of any agreements, rights or obligations which the said Marguerite Irwin may now or hereafter have relating to her interest in shares of stock in West End Development Co. . . ."

Identical powers of attorney were executed by all of the nurses and accepted by the attorney. Plaintiffs did not know the difference between an attorney in fact and an attorney at law, and they relied on the attorney as their attorney at law to protect their interests. Counsel for defendants have said that they did not think that they were acting as attorneys at law, and that the document was executed to facilitate a transfer of the nurses' stock in event of a sale of the corporation. The power of attorney does say that the attorney can do anything in connection with "the signing, making, executing, and delivering of all documents and matters in connection with the shares of stock owned by (the named nurse) in the said West End Development Co. and any interests which she may have or acquire in and to the assets of said corporation," but, although each nurse delivered her stock certificate to the attorney, none of the stock certificates were endorsed.

[2] Whatever may have been the technical legal status of the attorney, one thing is abundantly clear. The attorney had the power [if not the duty] to enforce any agreement the nurses had relating to their interests in shares of stock of West End Development Co. This the attorney selected by plaintiffs in reliance on Vroom's recommendation did not do, and it comes with poor grace for Vroom to say that plaintiffs' claims now are barred by a statute of limitations which defense, even under

Vroom's view of the facts, would not have been available if the attorney presently asserting that defense had acted.[3]

Totally apart from any claim of a defense of the statute of limitations, the record reflects that during the life of the power of attorney, plaintiffs and the attorney received a most unusual financial statement from Vroom supposedly setting forth the financial affairs of the company. The transmittal letter is dated April 8, 1970, and, although this was subsequent to the authorization of the $15,000.00 salary to Vroom, retroactive to March, 1969, no mention is made of that salary. This statement is remarkable in many respects, but perhaps most noteworthy is its treatment of the value of the land. Rental income from the land (there were some old improvements on it and it had been rented for grazing) is treated as a deduction from the value of the land. No question was raised by the attorney in fact then supposedly representing plaintiffs concerning the unusual accounting methods disclosed in the financial statement.

Finally, plaintiff did consult another attorney, and this lawsuit was filed March 1, 1971.

According to the company's records, after the partition of the land taken by Gordon, after the dissolution of Vroom Realty, and before the Taylor transaction, the

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3. Although we later find that plaintiffs' suit was timely filed, defendant would be estopped to count as part of the time period the year during which his personally selected attorney for plaintiffs failed to act. Johnson v. Neel, (1951) 123 Colo. 377, 229 P.2d 939, infra; General Accident Fire and Life Assurance Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862; Mabray v. Williams, 132 Colo. 523, 291 P.2d 677; Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008; Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725.

number of shares of stock held by each stockholder was:

Ann Taylor	15.38
Ewing Taylor	15.38
Roy Vroom	23.08
Marguerite Irwin	10.253
June Lease	10.253
Ada Rock	10.253
Julia Crowley	7.69
Lois McCaleb	7.69
Total Shares	99.979

[3, 4] Plaintiffs assert a right to a pro rata purchase of the 30.76 shares involved in the Taylor acquisition by Vroom and in the stock of Vroom Realty set over to Roy Vroom on dissolution of the partnership. We reject plaintiffs' contention as to the Vroom Realty stock for the reasons that we do not believe that either the syndicate agreement or the articles of incorporation contemplated that a settlement of partnership accounts on dissolution required an offering of the stock to other stockholders. Both the syndicate agreement and the articles refer to a sale, and counsel freely acknowledged at time of trial that the agreement would not cover an inheritance. We recognize that a debt from Jacob Vroom to the partnership was forgiven as a part of the transaction, but the transfer from Vroom Realty, a partnership, to Roy Vroom, a partner, was not a sale when that transfer was accomplished as a part of the partnership's dissolution and settlement of the partners' accounts. Moreover, any claim plaintiffs might have to share in this 10-year old partnership distribution of stock is barred under applicable Colorado statutes of limitation.

[5] In considering the statute of limitations defense interposed by defendant to plaintiffs' claim of a right to share in the Vroom Realty stock and the Taylor stock, there are three statutes which may possibly apply: (1) 1963 C.R.S. 87-1-11 is a six year statute applicable to contract actions; (2) 1963 C.R.S. 87-1-10 is a three year statute running from discovery, and it is made applicable to bills of relief on grounds of fraud and (3) 1963 C.R.S. 87-1-15 is a five year statute made applicable to "Bills of relief, in case of the existence of a trust not cognizable by courts of common law." The parties both say and the Court agrees that the five year statute is applicable. Farris v. Wirt (1901) 16 Colo.App. 1, 63 P.946.

[6] As we have earlier noted, the claim to share in the Vroom Realty stock is barred under any of the statutes which have been listed. However, when we come to the purchase by Roy Vroom of the Taylor stock, we have a different situation. The contract of purchase was dated September 9, 1965, and suit was filed March 1, 1971. However, Vroom did not receive the Taylor stock until a time well within either statutory period. Accordingly, neither the five nor the six year statute bar the action, and the case would not be barred under the three year statute because as to the Taylor sale to Roy Vroom, plaintiffs did not have knowledge of the sale, nor did they have knowledge of facts which would put a reasonable person on notice. Moreover, our later discussions of estoppel and breach of fiduciary duty apply to the limitations defense.

In seeking to resist the imposition of a trust on a portion of the Taylor stock, defendant falls back on two

more lines of defense. He says, (a) that restrictions on the sale of stock are against public policy and void; (b) that the Colorado stock transfer act required that the certificate itself show the restriction, and that absent such legend on the stock certificate, the stock could be freely bought and sold.

[7] Reasonable restrictions on the sale of corporation stock are not against public policy and they are not void. Seventy years ago Justice Holmes said in Barrett v. King, 181 Mass. 476, 63 N.E. 934:

> "Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership . . . there seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm."

[8] Colorado has judicially and legislatively approved of restrictions on the sale of stock. Sterling Loan & Inv. Co. v. Litel, 75 Colo. 34, 223 P.753; 1963 C.R.S. 31-3-2 (1) (j). The Congress of the United States, and most recently the United States Supreme Court have approved restrictions on the sale of stock. Affiliated Ute Citizens of Utah et al. v. United States et al., 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 [Decided April 24, 1972] relies on the Congressionally created restrictions. The restrictions here in question are reasonable and they are enforceable unless defendant can prevail on his defense of failure to comply with the provisions of the stock transfer act.

As of September 9, 1965, Colorado law [1963 C.R.S.

31-11-14] provided:

> "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaw of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

[9, 10] As part of Colorado's adoption of the Uniform Commercial Code, this section was repealed in 1965, effective July 1, 1966. The obvious purpose of the section was to make ineffective restrictions on transfers to persons without notice. Had the Taylors sold the stock to innocent purchasers, the notice missing from the stock certificates would have rendered the restriction invalid as to the innocent purchaser, but no notice is better than actual knowledge, and Vroom is charged with actual knowledge of the restriction. He signed the joint venture agreement. He gave notice under the joint venture agreement. He testified that the articles of incorporation were intended to carry forward the restrictions contained in the joint venture agreement. He signed the articles of incorporation, although he claims not to have read them. On November 1, 1963, he signed the Taylor stock certificates as president and he owed a duty to see to it that the restriction was placed on those certificates. He consciously concealed his purchase of the Taylor stock from plaintiffs. He cannot take advantage of his own wrongs to further injure the stockholders as to whom he occupied a fiduciary relationship. Sankin v. 5410 Connecticut Ave.

Corp. (1968) (D.C.D.C.) 281 F.Supp. 524; Baumohl v. Goldstein (1924) 95 N.J.Eq. 597, 124 A. 118. Had the Uniform Commercial Code been in effect in 1965, instead of in 1966, there would be no argument available to defendant. 1963 C.R.S. 155-8-204, which replaced 1963 C.R.S. 31-11-14, expressly says:

> "Unless noted conspicuously on the security, a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective *except against a person with actual knowledge of it.*" [Emphasis supplied]

[11] The new statute represented a change in phraseology, but not in the practical effect of the statute. Age Publishing Co. v. Becker (1943) 110 Colo. 319, 134 P.2d 205 must be read to say that on the facts here present, the failure to note the restriction on the certificates is no bar to its enforcement against Roy Vroom who had actual notice of it. And all else aside Roy Vroom is estopped from setting up the absence of the restriction from the face of the stock certificate as a defense. Colorado law of estoppel applies. Liberty National Bank & Trust Company v. Bank of America National Trust & Savings Association (1955) (10 Cir.) 218 F.2d 831. Colorado has gone far in applying the law of estoppel. In Johnson v. Neel (1951) 123 Colo. 377, 229 P.2d 939, it was said:

> "We are of the opinion that under the peculiar facts of this case the doctrine of estoppel in pais is applicable and controlling. This doctrine is founded upon principles of fair dealing and is designed to aid the law in the administration of justice where with-

out its aid, injustice might result. In 19 American Jurisprudence, page 640, we find the following statement: 'Generally speaking, however, equitable estoppel is a rule of justice which in its proper field prevails over all other rules.' *The doctrine of equitable estoppel has been invoked to cut off rights or privileges conferred by statute, and constitutional rights may be effectively waived by conduct consisting of action or failure to act.* (citations omitted) 'A statute cannot stand in the way of waiver or equitable estoppel when the facts der and their application in the interest of justice and right.' Kalloch v. Elward, [118 Me. 346, 108 A. 256]."

Other Colorado cases which require that defendant be estopped from asserting this defense are, General Accident Fire & Life Assur. Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862; Mabray v. Williams, 132 Colo. 523, 291 P.2d 677; Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008, and Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725. Roy Vroom the president, a director and the trusted manager of West End Development Company was a fiduciary as to the other stockholders. Homestake Mining Co. v. Mid-Continent Exploration Co. (1960, 10 Cir.) 282 F.2d 787; Herald Co. v. Bonfils (1970, D.C.Colo.) 315 F.Supp. 497; Hudson v. American Founders Life Ins. Co. (1963) 151 Colo. 54, 377 P.2d 391, and United States v. Gates (1967, 10 Cir.) 376 F.2d 65. He breached his contractual and his fiduciary duties to plaintiffs when he purchased the Taylor stock without honoring the agreement he had made to permit the other stockholders to share in the purchase. They are entitled

to share in that purchase at the price Roy Vroom paid, and a constructive trust is imposed on the 30.76 shares of stock purchased by Roy Vroom from Ewing and Ann Taylor.

The arithmetic of the constructive trust works out as follows:

Stockholder	*Shares owned divided by total outstanding less Taylor stock.*	*Percentage of shares outstanding less Taylor.*	*Shares of Taylor stock to which each stockholder is entitled.*
Vroom	23.08/69.219	33.34	10.2553
Irwin	10.253/69.219	14.81	4.5555
Lease	10.253/69.219	14.81	4.5555
Rock	10.253/69.219	14.81	4.5555
McCaleb	7.690/69.219	11.115	3.4191
Crowley	7.690/69.219	11.115	3.4191
		100.	30.76

[12] As has been noted, the purchase price per share of the stock purchased by Vroom from the Taylors was $1,205.22, and the other stockholders are entitled to purchase the shares above indicated from Roy Vroom at that price plus interest at the rate of 6% per annum from September 9, 1965, to the date such purchase is made by the other stockholders.[4] Plaintiffs shall have 30 days from the date judgment in this case becomes final within which to exercise their rights to purchase, and pending the expiration of that 30 day period, the stock which plaintiffs

4. Of course, the Court is without jurisdiction to impress a trust in favor of Ada Rock, but her interests must be taken into account in determining the rights of the stockholders who are before the Court.

are entitled to purchase is impressed with a trust in their favor.[5]

Plaintiffs have not heretofore formally tendered the purchase price to Roy Vroom, but it was implicit in all of the testimony in the case that they were willing to buy the stock at the price they now know was a bargain price. moreover,Vroom testified that he would not have accepted any tender and that he denied that plaintiffs had any right to share in the Taylor stock. Plaintiffs certainly could not be expected to tender their pro rata share of the purchase price while the fact of purchase was being concealed from them by Vroom, and after they found out about the deal, it was manifest that he had planted his feet and that a tender would have been a meaningless act. There was no requirement for tender until Vroom notified plaintiffs that they could share in the purchase, and it has taken this trial to establish plaintiffs' rights.

[13] We pass now to a consideration of the derivative claims. Prefatorily it should be noted that although the complaint may be somewhat defective under Rule 23.1, all pleadings were merged into the pretrial order, and it is abundantly clear from that order and from the conduct of the trial that all parties knew that they were going to trial on the derivative claims. Undeniably, plaintiffs made no demand on Roy Vroom and his personal secretary that the corporation assert these claims, but if ever there were a case in which such a demand would have been futile, this is that case. Judge Doyle

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5. The price to Irwin and Lease is $4,664.75, plus interest, and to McCaleb and Crowley, $3,496.00, plus interest.

discussed the necessity under Rule 23.1 for a futile demand in deHaas v. Empire Petroleum Company (D.C.Colo. 1968) 286 F.Supp. 809, and he held that a demand was not necessary. He said:

> "We conclude that the defendants so dominated American Industries, Inc. that a demand on its board of directors would probably have come to naught: that in the long run it would have been a futile and useless gesture. Since this derivative action is the only effective method of litigating the plaintiffs' claims, the demand requirement of Rule 23.1(2) is excused."

The Tenth Circuit affirmed in deHaas v. Empire Petroleum Company (1970) 435 F.2d 1223, saying:

> "Included among the requirements for pleading a derivative action under Rule 23.1 is the necessity of setting forth the efforts of the plaintiff, or the reasons for making no effort, to obtain intracorporate relief for the action he desires. In the case at bar, plaintiff admittedly made no effort to approach the directors but did set forth reasons for not so doing. The allegations may, of course, become the subject of factual dispute (as here) but the issue remains one for the court and its determination lies within the sound discretion of the court. Courts have generally been lenient in excusing demand. See Meltzer v. Atlantic Research Corp., 4 Cir. 330 F.2d 946
>
> "The trial court here held, prior to trial, that a derivative action was the only effective method of litigating plaintiff's claims and that demand was ex-

cused. We are in complete accord with this ruling for the reasons set forth in the trial court's memorandum decision, 286 F.Supp.809, 813-815, and we find nothing in the trial record that would indicate an abuse of discretion."

Demand is here excused, but we are not out of the woods in our consideration of the derivative claims. Those claims, of course, are claims brought in behalf of a Colorado corporation against a Colorado citizen, and we must think about our jurisdiction to rule on the claims. That we do have jurisdiction to determine the derivative action against Vroom for the recovery of the $15,000.00 paid to him is settled by Smith v. Sperling (1957) 354 U.S. 91, 77 S.Ct. 1112, 1 L. Ed.2d 1205. There, under somewhat similar circumstances the trial court dismissed for want of diversity jurisdiction, and the Supreme Court reversed. It was said:

"The gist of the findings of the District Court is th. t since there was no fraud on the part of the directors in making the contracts but only an exercise of independent business judgment, the management wa: not antagonistic to the financial interest of the corporation. That is an issue that goes to the merits, not to the question of jurisdiction. There will, of course, be antagonism between the stockholder and the management where the dominant officers and directors are guilty of fraud or misdeeds. But wrongdoing in that sense is not the sole measure of antagonism. There is antagonism whenever the management is aligned against the stockholder and defends a course

of conduct which he attacks. The charge normally is cast in terms of fraud, breach of trust, or illegality. . . .

"As the court said in Delaware & Hudson Co. v. Albany & S.R. Co., 213 U.S. 435, 451, [29 S.Ct. 540, 545, 53 L.Ed. 862,] where the management was deemed to be antagonistic to the stockholder 'the attitude of the directors need not be sinister. It may be sincere.' Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure is that of the corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim. . .

"Here it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy. A trial may demonstrate that the stockholder is wrong and the management right. It may show a dispute that lies in the penumbra of business judgment, unaffected by fraud. But that issue goes to the merits, not to jurisdiction. There is jurisdiction if there is real collision between the stockholder and his corporation. That there is such a collision is evident here."

[14, 15] It is settled that where the interests of the citizen corporation are consistent with those of the non-citizen plaintiffs and inconsistent with those of the

citizen defendant, the parties are realigned to accomplish diversity jurisdiction. The corporation is here realigned as a defendant to permit jurisdiction. See, annotation in 68 A.L.R.2d 821, 833, following the report of the decisions in Smith v. Sperling, supra, and Swanson v. Traer (1957) 354 U.S. 114, 77 S.Ct. 1116, 1 L.Ed.2d 1221, and see Judge Doyle's opinion in Dowd v. Front Range Mines, Inc. (D.C.1965) 242 F.Supp. 591. We have jurisdiction to pass upon the self-awarded salary paid to Vroom, and we do so.

[16, 17] It is hornbook law that a director of a corporation stands in a fiduciary relationship with the stockholders,[6] and in light of the inequality of the position of the parties here, Vroom's duties were even greater than those of the usual corporate director, and fraud would be presumed even if the fiduciary status of a person acting as a corporation director were not present. Dittbrenner v. Myerson (1946) 114 Colo. 448, 167 P.2d 15, settled the Colorado law in circumstances of inequality such as we have here. Justice Stone said:

> "In such a situation the facts are amply sufficient to bring the case under the third class of fraud set out by Lord Hardwicke in the classic case of Earl of Chesterfield v. Janssen, 2 Ves.Sr. 125, 155: Fraud '***which may be presumed from the circumstances and condition of the parties contracting: *** to prevent the taking surreptitious advantage of the

6. United States v. Gates (1967 10 Cir.) 376 F.2d 65; Wilshire Oil Co. of Tex. v. Riffe (1967 10 Cir.) 381 F.2d 646; Herald Co. v. Bonfils (1970 D.C.Colo.) 315 F.Supp. 497; Hudson v. American Founders Life Ins. Co. (1963) 151 Colo. 54, 377 P.2d 391; Kullgren v. Navy Gas & Supply Co. (1943) 110 Colo. 454, 135 P.2d 1007.

weakness or necessity of another ***.' The essential condition precedent to the applicability of this doctrine is an 'inequality' between the parties; there must be weakness on the one side and advantage taken of that weakness on the other, and 'It must appear that the dominant party either brought about the unevenness in the conditions, or, finding it ready to his hand, utilized and traded on it to extract from the servient party a gift or contract which he would not otherwise have made.' Bower on Actionable Non-Disclosure, p. 390, § 428. Where such a relation subsists between two persons, "The law presumes in favour of the servient party against the dominant party, (1) that the relation placed the dominant party in a position to exercise influence and dominion over the servient party; (2) that such influence and dominion operated upon, and procured the transaction; and (3), that the influence was an improper and unfair, or (to use the accepted phrase) an "undue influence".' Bower on Actionable Non-Disclosure, p. 363, § 405. '*** when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.' Aylesford v. Morris, 8 Ch.App. 484, quoted in Bower on Actionable Non-Disclosure, p. 391 § 428.

'"The principle on which a court of equity acts in relieving against transactions on the ground of in-

equality of footing between the parties is not confined to cases where a fiduciary relation is shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed.' Sears v. Hicklin, 13 Colo. 143, 148, 21 P. 1022, 1023, quoting from Kerr, Fraud & Mistake 183."

[18] Vroom with the connivance of his personal secretary, voted himself a $15,000.00 retroactive salary to be paid from a loan to the corporation. (He was actually paid $15,048.75) This salary was voted as payment for operating a losing business, and where the money is coming from to pay the bank loan when in a few years the balloon payment provisions of the loan agreement come into play is completely unclear. The June 4, 1969, resolution authorizing construction of the tennis courts itself said that if the company elected to operate the tennis courts, Vroom would be repaid his initial construction loan from the income derived from the tennis-courts, and the resolution authorizing the borrowing from the Bank of Aspen said that the loan's purpose was to repay Vroom, and that "any funds remaining after Roy Vroom is paid in full will be used to improve the tennis club site further." The resolution itself —without reference to its legality or illegality —didn't authorize the expenditure of the borrowed funds to pay Vroom a salary. "Although not necessary to the decision in this case, we comment that unless Vroom can escape under the provisions of Article VII of the Articles of In-

corporation it is doubtful that a quorum of directors voted the salary —at least only Vroom and his secretary signed the minutes —and under general principles of Colorado corporation law, Vroom wasn't eligible to vote." Paxton v. Heron (1907) 41 Colo. 147, 92 P. 15; Steele v. Gold Fissure Gold Mining Co. (1908) 42 Colo. 529, 95 P. 349; Laybourn v. Wrape (1922) 72 Colo. 339, 211 P.367. Moreover, when the salary was to be paid retroactively from borrowed funds for services allegedly rendered to a corporation which was losing money, it is apparent that no thought was given to the corporation's ability to pay as the law demands. Glenmore Distilleries Co. v. Seideman (1967 D.C.N.Y.) 267 F.Supp. 915.

[19] Vroom says that Article VIII of the Articles of Incorporation provide him with an escape hatch from the inevitable cancellation of his otherwise unlawful salary. It does not. It applies, by its terms, to contracts between the corporation and other corporations having common directors and it says:

> "Each person who may become a director or officer of the corporation is hereby relieved from any liability that might otherwise arise by reason of his contracting with the corporation for the benefit of himself or any firm or corporation in which he may in any way be interested."

[20, 21] Read in context, Article VIII was not intended to and it does not apply to salaries voted for himself by a dominant director. And, even if it did, the record establishes that the salary was completely unreasonable under all of the circumstances. Glenmore Dis-

tilleries Co. v. Seideman, *supra.* Exculpatory provisions of corporate articles create no license to steal. They do no more than to validate otherwise invalid agreements if such agreements are shown to be fair. Vroom was not entitled to the salary he voted himself, and he owes it back to West End Development Company plus interest from the date of its unlawful payment to him. No more is Vroom entitled to charge the corporation interest in the amount of $3,128.24 on the loan he made to the corporation which interest he paid to himself when the $39,216.91 loan principal was repaid him from the Bank of Aspen loan. The corporation is entitled to judgment for that amount, again plus interest.

[22] We have not resolved the questions of the corporation's claims for (a) a full accounting from Vroom, and (b) damages which may result from the allegedly improvident investment in tennis courts.[7] We shall not resolve those questions in this lawsuit. It is doubtful that they are included in the issues framed, but, even if they are we doubt our jurisdiction to determine these matters, and the damage question does not appear to be ripe for present decision.

In passing upon the damage claim it would be necessary to determine if the tennis courts represent the highest and best use of the land. We would be required to determine the fair cash market value of the raw land involved applied to its highest and best use, add to that value the

7. Plaintiffs urge that the building of the tennis courts was ultra vires. We disagree. We think that construction and operation of commercial tennis courts lies within the powers and purposes enumerated in Article III, paragraph 1, of the corporation's articles.

cost of the tennis courts, and see if the value of the developed land equaled the sum of those two amounts. Then, it would be necessary to take into account the fact that the tennis courts are built on land included in a zoning set-back area and defendant Vroom's belief that the developed tennis courts add value to the remainder of the undeveloped land. This is a neat appraisal problem which requires a use study and an appraisal of all of the land owned by the corporation if all of the land be so developed. It is likely that such a study would use at least in part an income approach to value, and this would directly or indirectly take into account the loss history of the tennis courts. The record is not adequate to make any findings in this area, and we leave this for later determination after an appropriate record can be made.

However, this determination will not be made by this Court even upon a later full record. After the decree in this case is implemented [and assuming that a similar result is reached in Ada Rock's case now pending in the state court] the stock of West End Development Company will be owned:

Vroom	33.3353
Irwin	14.8085
Lease	14.8085
Rock	14.8085
McCaleb	11.1091
Crowley	11.1091

This will give plaintiffs and Ada Rock control of 66.64% of the stock. Even without the stock to be awarded to Rock if the state court disagrees with our findings, plaintiffs, and Rock, taking into account Rock's present stock ownership, will control 62.08% of the corporation's

stock. Under these circumstances, the antagonism permitting realignment for diversity purposes would not exist under the rule of Smith v. Sperling, and Swanson v. Traer, supra. By the same token, with the implementation of this decree and plaintiffs' resultant control of the corporation, all of its books and records will be under their direction, and the Court's assistance in forcing an examination of those books and records should not be required. If, after an examination of the corporate books, an accounting appears to be necessary, the jurisdictional antagonism between plaintiffs and the corporation would not exist, and any such proceeding would be for the state courts to handle.

[23, 24] Lastly, plaintiffs ask for an award of attorneys fees for counsels' services in prosecuting the derivative claim. Counsel fees may be and usually are awarded when the attorneys' services result in a pecuniary benefit to the corporation. Trustees v. Greenough (1882) 105 U.S. 527, 26 L.Ed. 1157; McCourt v. Singers-Bigger (1900 8 Cir.) 145 F. 103 [which was a case tried in Colorado]; Slayton v. Missouri Pacific Railroad Company (1968 D.C.Mo.) 279 F.Supp. 525; Mardel Securities, Inc. v. Alexandria Gazette Corporation (1967 D.C.Va.) 278 F.Supp. 1010; and see annotation in 39 A.L.R.2d 580. Attorneys fees should be and they are awarded in this case in the amount of $5,000.00, such fees to be paid by the corporation to counsel for plaintiffs. Of course, the corporation should pay none of defendants' attorneys fees, but if it has done so, this payment should be accounted for in the accounting suit which may follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, DONALD C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the West End Development Company,
Defendants

MOTION FOR ORDER GRANTING RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b) (5) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendant Roy Vroom, by his attorneys, Helmick, Conover & Burkhardt, pursuant to Rule 60 (b) (5) of the Federal Rules of Civil Procedure, moves the Court for an

Order relieving said Defendant from that portion of the Court's Judgment and Decree of May 11, 1972 which impressed a constructive trust upon 30.76 shares of stock of West End Development Company and which ordered and directed said Defendant to transfer said stock to any of said Plaintiffs who tendered purchase prices to said Defendant within thirty days from the date said Judgment became final. As grounds for said Motion, Defendant Roy Vroom states that there has been compliance with the Court's Judgment and Decree, that said constructive trust has been released and that there has accordingly been a satisfaction of that portion of the Judgment which impressed the constructive trust upon the 30.76 shares of stock of West End Development Co. As further grounds, Defendant Roy Vroom also states as follows.

1. In its Judgment and Decree dated and entered on the docket on May 11, 1972, the Court impressed a constructive trust upon 30.76 shares of stock of West End Development Company owned by Defendant Vroom in favor of Plaintiffs Marguerite Irwin, June M. Lease, Julia G. Crowley and Lois M. McCaleb. The constructive trust so impressed for each Plaintiff was expressly conditioned upon the tender by each Plaintiff to Defendant Vroom of a certain amount of money. Each such tender was to have been made within thirty (30) days from the date the judgment became final.

2. Said judgment also provided that if such tenders were not made the constructive trust "shall be released."

3. More than thirty (30) days have elapsed since the

Court's Judgment of May 11, 1972 became final.

4. As is shown by the Affidavits of Defendant Roy Vroom and Frederic K. Conover II, attached hereto as Exhibits "A" and "B", none of the Plaintiffs Marguerite Irwin, June M. Lease, Julia G. Crowley and Lois M. McCaleb, has tendered the amount required by the Court's Judgment and Decree. As a result, there has been full compliance with and a satisfaction of that portion of the Judgment and Decree which imposed the constructive trust, and the constructive trust has been released by the terms of the Judgment and Decree.

5. Although a Notice of Appeal has been filed herein, and the record on appeal filed with the United States Court of Appeals, Tenth Circuit, Action No. 72-1755, this Court has jurisdiction to hear this Motion under Rule 60 (b) of the Federal Rules of Civil Procedure without the necessity of a preliminary petition being filed with the appellate court. *Wilkin v. Sunbeam Corporation*, 405 F.2d 165 (10th Cir., 1968).

DATED this 6th day of November, 1972.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,
Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation, DONALD C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the West End Development Company,
Defendants

ORDER DENYING RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b) (5)

This matter came on for hearing on Defendant Roy Vroom's Motion for Order Granting Relief from Final Judgment Under Rule 60 (b) (5) of the Federal Rules of Civil Procedure on November 17, 1972. By judgment en-

tered May 11, 1972, the Court impressed a constructive trust upon 30.76 shares of stock of West End Development Company held by the Defendant Roy Vroom conditioned upon tender by the Plaintiffs of certain sums, and provided that "such tender shall be made within thirty days from the date this judgment becomes final, and, if such tender be not made, the trust hereby impressed shall be released."

The subsequent proceedings in this case were recounted by the Court at a hearing on August 18, 1972. The Court's judgment has been appealed to the United States Court of Appeals for the Tenth Circuit.

The parties have stipulated that no tender has been made by the Plaintiffs up to and including November 17, 1972 and that neither the parties nor their representatives ever discussed the question of tender up to and including August 18, 1972. Because of the failure to tender the Defendant Vroom urges that the constructive trust has been released, and the judgment satisfied in that respect. It was the intention of the Court to impose a constructive trust until thirty days after the judgment or order of the final court to which an appeal is taken, and therefore it is

ORDERED, that Defendant Vroom's Motion for Order Granting Relief from Final Judgment Under Rule 60 (b) (5) of the Federal Rules of Civil Procedure be denied.

BY THE COURT:
Fred M. Winner
United States District Judge
Date: November 17th, 1972.

APPROVED AS TO FORM:
William J. Carney
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Nos. 72-1755, 72-1825.

June 29, 1973.

Marguerite IRWIN et al., Plaintiffs-Appellees,

v.

WEST END DEVELOPMENT COMPANY,
a Colorado corporation, et al., Defendants-Appellants.

Rehearing Denied Aug. 17, 1973.

William J. Carney, Aspen, Colo. (J. D. Muller, Aspen, Colo., on the brief), for plaintiffs-appellees.

Frederic K. Conover, II, Denver, Colo., for defendants-appellants.

Before PICKETT, McWILLIAMS, and BARRETT, Circuit Judges.

BARRETT, Circuit Judge

Roy Vroom appeals from the District Court's judgment, 342 F.Supp. 687, impressing a constructive trust in favor of the appellees on 30.76 shares of West End Development Company stock sold to him by the Taylors, together with the Order directing him to pay West End Development Company $15,048.75 of salary and $3,128.24 of interest which he was held to have

wrongfully received. Vroom also appeals from the $5,000 attorneys' fees awarded appellees' counsel.

The appellees are four registered nurses who served in the U.S. Army Nurses' Corps and/or the Veterans' Administration. They were transferred every year or two to stations around the world. Some of them were stationed in Colorado at various times.

In 1957 Marguerite Irwin and Ada Rock, who is not a party to this suit inasmuch as she is now a resident of Colorado and has a similar suit pending in State court against Vroom, went to Aspen, Colorado, to inquire about purchasing a small lodge to operate after their retirement. They visited Vroom Realty. Roy Vroom interested them in joining in the purchase of 30 acres of undeveloped land just outside of Aspen for $45,000. One-half of the $18,000 down payment was tendered by Rock, Irwin and Lease, and the other half by Vroom Realty and Theodore Gordon. Lease, Irwin and Rock then held 20% interest, Vroom Realty, 40% and Gordon, 40%. Vroom Realty and Gordon sold 5% of their interests to Julia Crowley and Lois McCaleb, also registered nurses serving as the other appellees.

A syndicate agreement was entered into in late 1957[1]. It was prepared by Vroom's attorneys, mailed to

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1. The Agreement to Form a Syndicate contained the following language in Article X:

> No party may sell or assign his interest herein or any fractional portion thereof without first offering his interest or fractional portion to the other parties, in writing, and allowing them, or any one of them, 15 days to meet his price, in cash, the name of the proposed purchaser being disclosed. No party shall thereafter sell his interest or any fractional portion thereof to anyone at less than the above offered price. Otherwise the interests or any fractional portion thereof shall be freely assignable.

the nurses and executed by them. In 1963 the syndicate was abandoned and a Colorado corporation known as the West End Development Company was organized by Vroom at the suggestion of his attorneys in Aspen. The nurses consented to the incorporation; however, they were not sent copies of the Articles of Incorporation and, in fact, they did not see them until shortly before trial. Upon incorporation Vroom served as President, Treasurer and Chairman of the Board. Until 1968, the other two directors were Mr. Petre and Mr. Zimmerman, Vroom's attorneys. They also served as secretary and vice-president, respectively. After that time the Board consisted of Vroom and two of his employees. Prior to the closing of the purchase of the property, Vroom assigned 10% of his investment in the syndicate to Mr. and Mrs. Taylor for $10,000 for a loan the Taylors had made to him. He did not inform the other syndicate interest holders of this transaction. In 1958 the syndicate interests and investments were as follows:

	Total Interest in Syndicate	*Initial Cash Investment*
Five Nurses	30%	$ 16,500
Gordon	35%	750
Taylors	10%	10,000
Vroom	25%	9,250

After incorporation, the stock was owned as follows:

Roy Vroom	23.08 shares
Ann Taylor	15.38 shares
Ewing Taylor	15.38 shares
Marguerite Irwin	10.253 shares

June Lease	10.253 shares
Ada Rock	10.253 shares
Julia Crowley	7.69 shares
Lois McCaleb	7.69 shares

In 1961, Gordon, as a result of a partition, received ten acres of the land for his 35% interest in the syndicate.

In September, 1965, the Taylors sold their 30.76 shares to Vroom at $1,025 per share. That same year Vroom offered to buy the five nurses' stock for $600 per share. In 1966 and 1969 Vroom mailed the nurses financial statements reflecting his purchase of the Taylors' stock.

The land appreciated in value due to the development of the Buttermilk Ski Area nearby. Vroom continually requested the nurses to sell their stock at prices substantially lower than their known value; he did not disclose to the nurses the price he paid for the Taylors' stock; he did not state to them that he was personally interested in buying their shares; and he failed to disclose to them the price surrounding land was selling for. In 1968 a site across the street from the subject land sold for $15,000 per acre. At that valuation, attributable to the West End Development Company acreage, each share of stock would have been worth $3,000. That year Vroom stated in a letter to the nurses that they could sell their stock for $800 per share. It is conceded that Vroom is knowledgeable and experienced in land values, land development and land planning.

Vroom's alleged efforts to sell the land did not materialize. He decided to build a Swim and Racket Club

in 1969. Although the shareholders did not consent to the construction of the tennis courts, Vroom proceeded with the construction based upon the approval of the project by the Board of Directors consisting of Vroom and two of his employees. The Board of Directors voted to accept Vroom's loan to the corporation of $39,216.91 with interest at the rate of 9% to construct the courts. Vroom wrote to the nurses about the construction plans. Miss Rock and Miss Irwin went to Aspen to consult with a lawyer. Vroom suggested that they contact the corporation's lawyer, Mr. Helmick. They did so and thereafter executed their powers of attorney relating to their stock to Mr. Helmick.

Also in 1969 Vroom and Powers, Secretary of the Board of Directors, authorized the corporation to borrow $75,000 from the Bank of Aspen to repay Vroom his loan plus interest and to pay a retroactive salary to Vroom of $15,000. Certain of the corporate property was mortgaged to secure the loan. At no time did Vroom inform the shareholders of the salary he had received from the corporation, of the Bank of Aspen's loan to the corporation, or of the interest paid to him. In 1969 the financial statement simply disclosed Vroom's loan to the corporation. The tennis courts lost money in 1970 and 1971.

Vroom contends that: (1) it was error for the trial court to impose a constructive trust on the 30.76 shares which he acquired from the Taylors because Article IV, Paragraph 6 of the Articles of Incorporation is not enforceable; (2) the provisions of Section 15 of the Uniform

Stock Transfer Act barred the trial court's impression of a constructive trust; (3) the imposition of a constructive trust is barred by the statute of limitations and the doctrine of laches; (4) the trial court's application of estoppel was in error; (5) the constructive trust has been released by the expiration of 30 days from the date the judgment became final; (6) the trial court erred in granting judgment against Vroom for salary and interest paid to him; and (7) the trial court's award of attorneys' fees was in error.

I.

Vroom contends that the Court erred in impressing a constructive trust on his stock purchased from the Taylors because Article IV, Paragraph 6 of the Articles of Incorporation is not enforceable. It states:

> No shareholder shall sell or transfer any outstanding shares of the capital stock issued by the corporation to such shareholder, excepting to the other shareholders, in the proportion which the number of shares owned by each bears to the total shares outstanding, without the prior consent of the owners or at least two-thirds (2/3) of the shares entitled to vote at the shareholders' meeting . . .

Vroom alleges that the provision is unintelligible, unworkable, and too uncertain in its terms to be enforced or to give the appellees their pro-rata rights to the purchase of stock sold to Vroom by the Taylors. Substantially the same proviso was incorporated in the Syndicate Agreement. Vroom argues that it is also an unreasonable restraint on the alienation of the corporation stock.

[1, 2] The appellees did not seek to have the Articles of Incorporation specifically enforced, but rather to effectuate the intent of the Articles as a matter of equity in order to prevent fraud. The trial court did not enforce the Articles of Incorporation, but rather the fiduciary duty which the Court found Vroom owed the nurses. The law prohibits an absolute restriction against transferability, but if a restriction does not amount to an effective prohibition against transferability, then the test is reasonableness. Thus, a "first refusal" provision is valid in Colorado. Sterling Loan & Investment Co. v. Litel, 75 Colo. 34, 223 P. 753 (1924). The trial court recognized that the provision contained ambiguities but it construed them against the drafter and gave the provision a reasonable meaning according to Vroom's intent that the Articles should provide a workable and equitable result. The trial court stated that instead of stating "in proportion which the number of shares owned by each bears to the total shares outstanding", the draftsman meant to state, "in the proportion which the number of shares owned by each bears to the total shares not offered for sale." Vroom was, or should have been, well aware of the provisions contained in the Articles of Incorporation. He should have offered the Taylors' stock to the nurses on a pro-rata basis before purchasing it entirely for himself. The nurses were not aware of their right to purchase the Taylor stock until they saw the Articles in 1970. They relied on Vroom's judgment, honesty and fair dealing. Vroom owed a fiduciary duty to them. He breached this duty in not offering them their proportion of the Taylor stock. A constructive trust was imposed by the trial court

because Vroom would be unjustly enriched by being permitted to keep the 30.76 shares. The trust arose because of unconscionable conduct by Vroom in obtaining the shares from the Taylors for his sole benefit. McConnell v. Dixon, 68 Wyo. 301,233 P.2d 877 (1951).

II.

Vroom contends that the provisions of Section 15 of the Uniform Stock Transfer Act barred the trial court's impression of a constructive trust upon the Taylor stock. It states:

> There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any bylaw of such corporation, or otherwise, unless the right of the corporation to such a lien or the restriction is stated upon the certificate. 1963 C.R.S. 31-11-14.

Vroom alleges that the effect of the statute is to render ineffective the restrictive provisions of Article IV, Paragraph 6 of the Articles of Incorporation because the restrictions were not set forth upon the stock certificates sold by Taylors to Vroom.

[3, 4] Section 15 of the Uniform Stock Transfer Act was superseded by 1963 C.R.S. 155-8-204 which states:

> Unless noted conspicuously on the security, a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it.

The purpose of Section 31-11-14 was to make ineffective restrictions on transfers to persons without notice. Sankin v. 5410 Connecticut Avenue Corporation, 281 F.Supp. 524 (D.D.C.1968), aff'd, 133 U.S.App.D.C. 361, 410 F.2d 1060 (1969), cert. denied 396 U.S. 1041, 90 S.Ct. 681, 24 L.Ed.2d 685 (1970). The failure to note the restriction on the certificates is no bar to its enforcement against Vroom who had actual notice of it. The trial court went further and stated that in any event, Vroom is estopped from setting up the absence of the restriction from the face of the stock certificate as a defense, inasmuch as he owed a fiduciary duty to the other stockholders. Vroom breached his contractual and fiduciary duties to the appellees when he purchased the Taylor stock without honoring the agreement he had previously made to permit the other stockholders to share in the purchase. The only equitable solution is the one the trial court arrived at, i.e., the imposition of a constructive trust on the 30.76 shares of stock purchased by Vroom from the Taylors. In this regard, we note that Vroom will share on a pro-rata basis, notwithstanding his breach.

III.

Vroom alleges that the statute of limitations and the doctrine of laches bar this action. All parties agree that 1963 C.R.S. 87-1-15 applies, which is a five-year limitation on bills of relief. Vroom alleges that since the Taylor sale of stock occurred no later than September 15, 1965, the five-year limitation expired on September 15, 1970, some five months before the suit was filed. Vroom further alleges that even if the appellees are not barred by

the statute of limitations, they are barred by the doctrine of laches, because they took no interest in the project for five years while Vroom was devoting substantial time to the development of the property.

[5-7] The actual sale of the Taylor stock to Vroom was concealed from the stockholders until Vroom sent the 1965 financial statement on March 7, 1966, within the five-year statute of limitations. Even so, when the nurses learned of the sale of Taylors' stock to Vroom they had no reason to object because they were unaware of the restriction on its sale. They had no knowledge of the restriction until they received copies of the Articles of Incorporation in 1970. Thus the statute of limitations could not begin to run until the appellees knew in 1970 of the trust which Vroom violated. Cliff v. Cliff, 23 Colo.App. 183, 128 P. 860 (1912). There is no distinction between resulting trusts and constructive trusts as far as laches and the statute of limitations is concerned. Vandewiele v. Vandewiele, 110 Colo. 556, 136 P.2d 523 (1943). Laches is not a valid defense. The nurses brought the action soon after learning of Vroom's breach of trust. The elements of laches are full knowledge of the facts, unreasonable delay in asserting an available remedy, and intervening reliance by and prejudice to another. Herald Company v. Seawell, 472 F.2d 1081 (10th Cir. 1972). The elements are not present here.

IV.

Vroom next asserts that the trial court's attempts to avoid the effects of the statute of limitations and the Uniform Stock Transfer Act by invoking the doctrine of estoppel was in error. Vroom contends that since the

issue of estoppel was not raised in the pleadings or the pretrial order, and must be pleaded specially, the Court could not rule or rely thereon.

[8-10] Estoppel arises here not as an affirmative defense, but as a reply to an affirmative defense. It need not be pleaded specially. The trial court is obligated to determine the issues presented by the evidence properly before it. Issues will be treated as if they had been raised by the pleadings when they are tried by the implied consent of the parties. Knudson v. Boren, 261 F.2d 15 (10th Cir. 1958). Since Vroom introduced the evidence forming the basis for the estoppel, he cannot now complain.

V.

Vroom alleges that the constructive trust has been terminated by the expiration of 30 days from the date the judgment became final because appellees did not tender payment of their pro-rata share of the Taylor stock as required by the judgment. Vroom contends that the judgment became final ten days after the entry of the trial court's judgment.

[11, 12] The general rule is that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties, so the party who is to perform the condition has the specified time starting from the time that the appellate court judgment becomes effective to perform the condition. 4 Am.Jur.2d, Appeal & Error § 363. This court recognized the rule in First National Bank in Dodge City v. Johnson County National Bank and Trust Company, 331 F.2d 325 (10th Cir. 1964), where we said that a final

and appealable order is one which terminates the litigation between the parties on the merits of the case and on affirmance the trial court will have nothing to do but execute the judgment it originally entered. See Weingartner v. Union Oil Company of California, 431 F.2d 26 (9th Cir. 1970), cert. denied 400 U.S. 1000, 91 S.Ct. 459, 27 L.Ed.2d 451 (1970); Rule 62 (a), Fed.R.Civ.P., 28 U.S.C.A.; 28 U.S.C.A. §§ 1291-1294. Thus the appeal suspended the time for performance by the nurses of tendering payment for the shares of stock available to them through the imposition of the constructive trust on the Taylor stock. They must tender payment only after the judgment from this court becomes effective.

VI.

Vroom next contends that the trial court erred in granting judgment against him for salary and loan interest paid to him. Vroom alleges that his salary and the interest paid to him are authorized under the "business judgment" rule and were also permitted under the provisions of Article VIII, Paragraph 1 of the Articles of Incorporation.

[13-16] The Articles of Incorporation do not authorize salaries to be paid to the directors or officers. Vroom's salary was paid by a loan from the Bank of Aspen at a time when the corporation had no operating funds. The directors, in fixing their salaries, must consider the financial condition of the corporation. Glenmore Distilleries Company v. Seideman, 267 F.Supp. 915 (E.D.N.Y. 1967). Retroactive salaries are voidable where no extraordinary services are performed. Vroom's compensation was already set at $14 per regular meeting, $25

per special meeting; no further compensation was authorized without shareholder approval. His salary was approved by a resolution signed by himself and his secretary who was on the Board of Directors. Since Vroom's presence and vote were necessary to provide a quorum of directors, the transaction is voidable; he cannot vote for his own salary. Steele v. Gold Fissure Gold Mining Co., 42 Colo. 529, 95 P. 349 (1908). Vroom's loan to the corporation and the interest he received, together with the retroactive salary, constituted a breach of his fiduciary duty; he could not profit at the expense of other stockholders. Wilshire Oil Company of Texas v. Riffe, 381 F.2d 646 (10th Cir. 1967), cert. denied 389 U.S. 822, 88 S.Ct. 50, 19 L.Ed.2d 75 (1967). He had assured the shareholders that the tennis courts would cost nothing to the corporation. Such, of course, was not the case.

VII.

[17] Vroom argues that the trial court's award of attorneys' fees of $5,000 by West End Development Company to appellees' counsel was in error because the appellees had not requested attorneys' fees and because there was no evidence presented as to the incurring or reasonableness of the fees. Attorneys' fees may be granted only if evidence is introduced establishing the value of the services performed. Del Rey Air v. Expressway Airpark, Inc., 468 F.2d 187 (10th Cir. 1972). No evidence was introduced regarding the value of the attorneys' services. Accordingly, the award must be set aside.

The judgment awarding attorneys' fees is reversed; the judgment is otherwise affirmed.

SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

No.73—758

October term, 1973

ROY VROOM, Petitioner,

v.

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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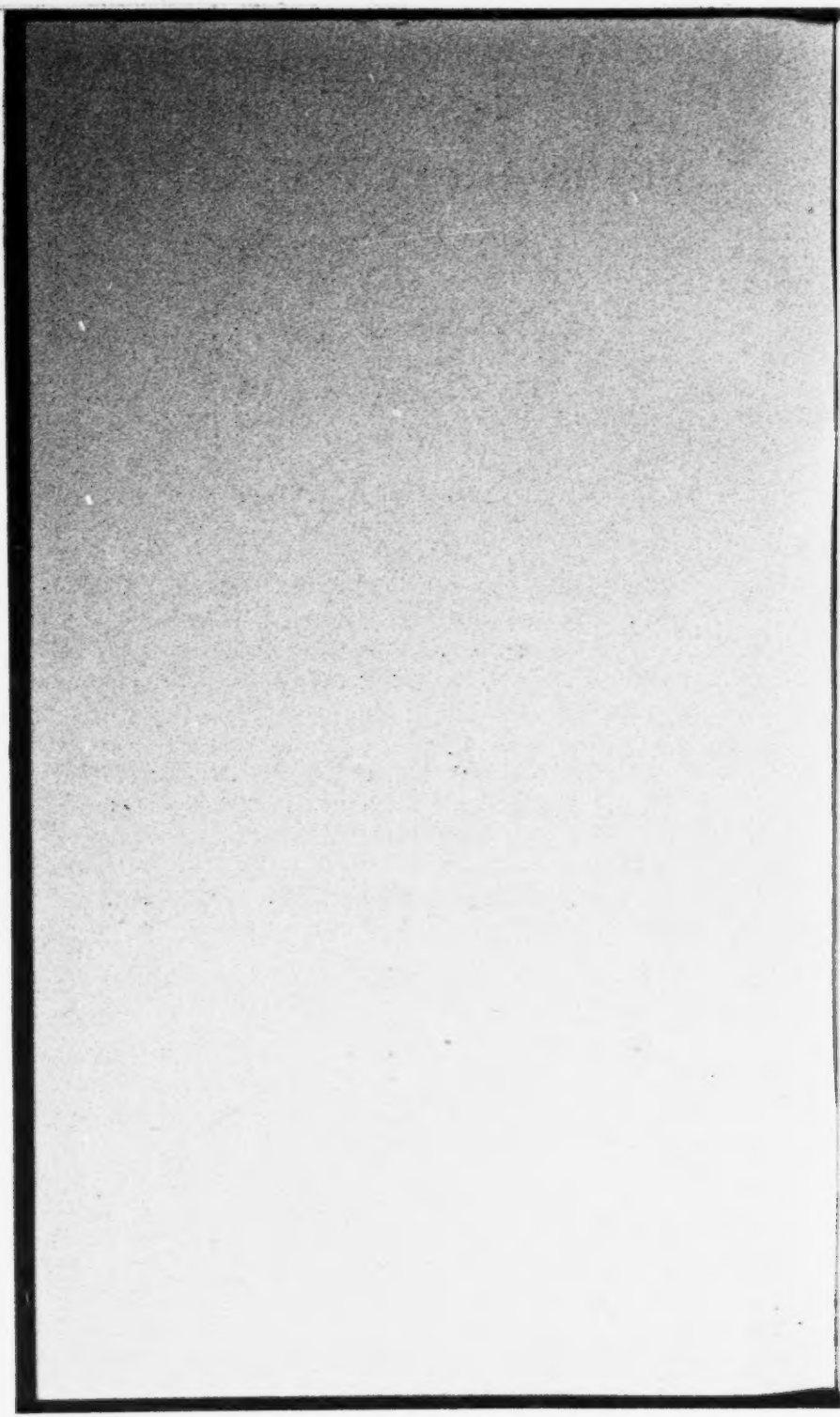

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SUPREME COURT OF THE UNITED STATES

No.73—758

October term, 1973

ROY VROOM, Petitioner,

v.

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, Individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. p.i of Petition) is reported at 342 F. Supp. 687 (D. Colo. 1972). The opinion of the Court of Appeals for the Tenth Circuit (App. p.xxxix of Petition) is reported at 481 F.2d 34.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The United States District Court impressed a constructive trust upon shares of common stock as a remedy for petitioner Vroom's wrongful acquisition of those shares, and provided that the other stockholders, respondents here, "shall have 30 days from the date judgment in this case becomes final within which to exercise their rights to purchase, and pending the expiration of that 30 day period, the stock which plaintiffs are entitled to purchase is impressed with a trust in their favor." (342 F. Supp. 687, 698; App. xxii-xxiii of Petition). Petitioner made timely motions for new trial or in the alternative for amended findings and judgment, and for a stay of execution of or any proceedings to enforce the judgment, and appealed to the United States Court of Appeals in timely fashion. During the course of these actions, petitioner Vroom also moved the court for an order relieving him from the portion of the judgment imposing the constructive trust, on the ground that the time for tender of the purchase price of the stock began to run at the time the judgment became enforceable for purposes of execution. The District Court denied that motion, stating that the time for performance ran for thirty days from the time when the judgment became final on appeal.

The questions then presented are:

1. Where a trial court gives plaintiffs thirty days from the day its decree "becomes final" to tender the purchase price for stock impressed with a constructive trust, does such time run from the date the judgment becomes final on appeal?

2. Where a court holds that an appeal postpones the time for performance of a condition in a decree, does this necessarily constitute a holding that the decree was not previously enforceable, where no attempt has been made to judicially enforce the decree?

STATUTE AND RULES INVOLVED

Title 28, United States Code, Federal Rules of Civil Procedure:

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting,

dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

* * *

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Rules 69(a) and 70 are set forth in the Petition at pp. 4-5.

STATEMENT OF THE CASE

This action was brought in March 1971 to impress a constructive trust upon certain shares of stock in West End Development Company which had been purchased by petitioner Roy Vroom from former stockholders. Other claims for relief, not brought before this Court by Vroom, were in the nature of derivative claims on behalf of West End Development Company, to recover certain sums paid by the company to Vroom, who served as its president and sole operating officer while these respondents were scattered around the globe in the United States Army Nurse Corps and in the Veterans' Administration.

The District Court found against Vroom on the derivative claims and entered judgment against him in the amount of $18,176.00 plus interest. The Court ruled that he had wrongfully caused the corporation to pay him a secret retroactive salary when the corporation had no working capital and had to borrow the money for the payment. The Court also ruled that Vroom had wrongfully caused the corporation to pay him interest on money which he loaned to the corporation. Funds for payment of both the illegal salary and the illegal interest were obtained by the corporation from a large bank loan. (342 F. Supp. 687, 700-701; R.Supp. Vol. II, 183).

The stock upon which the constructive trust was imposed had been purchased by Vroom from other stockholders, the Taylors, in September of 1965, but the nurses, respondents here, did not learn of the transfer until the following March. "Even so, when the nurses learned of the sale of Taylors' stock to Vroom they had no reason to object because they were unaware of the restriction on its sale. They had no knowledge of the restriction until they received copies of the Articles of Incorporation in 1970." 481 F.2d 34, 39. This was only after the nurses had been dissuaded from hiring independent counsel by Vroom, ". . . and still innocently acting on their misplaced trust in Vroom, they followed his recommendation and consulted the Denver attorneys for West End Development

Company." 342 F. Supp. 687, 694. This attorney had the power, under powers of attorney suggested by him to the nurses, to enforce any agreements with Vroom. "This the attorney selected by the plaintiffs in reliance on Vroom's recommendation did not do . . ." 342 F. Supp. 687, 695 (1972). Indeed, it was not until 1970, when the nurses had retained independent counsel, that they learned of the restrictions on the transfer of shares contained in the Articles of Incorporation. (R. Vol. I, 67, 70, 71, 79, 80, 87, 88, 94, 95). This explained the long delay in filing suit based on this breach of Vroom's fiduciary duty. In response to an affirmative defense based upon the statute of limitations, the District Court denied the defense, saying: " . . . it comes with poor grace for Vroom to say that plaintiffs' claims now are barred by a statute of limitations which defense, even under Vroom's view of the facts, would not have been available if the attorney presently asserting that defense had acted." 342 F. Supp. 687, 695.

To remedy the situation created by what it called "this sordid tale", 342 F. Supp. 687, 694, the District Court impressed a constructive trust on the shares wrongfully purchased by Vroom until "thirty days from the date judgment in this case becomes final, and if such tender of the purchase price determined by the District Court be not made, the trust hereby impressed shall be released." (emphasis added) (R. Vol. III, 304).

The Judgment and Decree of the District Court was entered May 11, 1972. On May 22, 1972, Vroom moved for a new trial and for an order amending the findings of the court. (R. Vol. III, 305) On June 23, 1972, The District Court denied the Motion for New Trial and amended its findings in respects not now material. (App.iii) On June 5, 1972, Vroom moved the District Court for a stay of execution of or any proceedings to enforce the judgment, pursuant to Rule 62(b), Federal Rules of Civil Procedure, (App.i) which was also denied by the District

Court's order of June 23, 1972. (App.v) No appeal was taken from this order.

On July 21, 1972, Vroom filed a Notice of Appeal with respect to the Judgment and Decree of May 11, 1972. On November 6, 1972, 179 days after entry of the Judgment and Decree of the District Court, Vroom filed a motion for relief from the District Court's Judgment and Decree on the ground that the judgment was final when entered on May 11, 1972, and no tender of the purchase price for the shares having been made within 30 days of that date, the constructive trust had been released and that portion of the judgment had been satisfied. (App. to Petition, xxxiv) On November 20, 1972, the District Court denied Vroom's motion, noting in its Order that "It was the intention of the Court to impose a constructive trust until thirty days after the judgment or order of the final court to which an appeal is taken, and therefore it is Ordered, that Defendant Vroom's Motion for Order Granting Relief from final Judgment Under Rule 60(b) of the Federal Rules of Civil Procedure be denied." (App. to Petition, xxxvii-xxxviii)

The denial of this motion was appealed to the Tenth Circuit Court of Appeals, which affirmed the ruling of the District Court.

SUMMARY OF ARGUMENT

From a reading of the Petition, it appears that petitioner is attempting to argue that the holding of the court below is that the judgment and decree of the District Court was not enforceable ten days after its entry, pursuant to Rule 62, Federal Rules of Civil Procedure. This was not the holding. The courts below merely held that where a decree provides that a condition must be performed within 30 days from the date the judgment becomes final, that such a time period runs from the time the judgment becomes final on appeal. It is clear from the order that pending the expiration of such period, a constructive trust has been imposed on the stock so that it will be preserved

for the benefit of those plaintiffs who choose to tender within the time allowed. Thus the constructive trust has been in force from the entry of the District Court's order to preserve the subject matter of this litigation, pending the resolution of this appeal. The court below did not address itself in any manner to the question of when the decree of the District Court became final for purposes of enforcement, since that question was never raised by any attempt to obtain judicial enforcement, and no appeal was taken by petitioner Vroom from the denial of a stay of enforcement.

The court below only decided that the language of the judgment and decree of the District Court gave the plaintiffs thirty days from the time the judgment becomes final on appeal within which to perform a condition precedent to a vesting of their rights to the stock in dispute. This question had nothing to do with the enforcement of the judgment and decree at the time of entry. The consistent ruling of all the courts which have passed on this narrow question is that whether the judgment is final for purposes of enforcement is irrelevant, and " . . . that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties . . . " 481 F.2d 34, 39 (1973). It would obviously be a useless act to require a party to perform a condition precedent to a right when the party's right is still subject to a final decision on appeal.

Finally, any questions which might have been raised by Vroom have been rendered moot by his acceptance and retention of the tendered purchase price for the shares with respect to three of the nurses. Paradoxically, Vroom suggests that his obligation to deliver the shares has been suspended by this appeal, while arguing here that the time for performance of the nurses' duty could not be suspended or extended by appeal.

ARGUMENT

I.

THE COURT OF APPEALS' DECISION DID NOT DETERMINE WHETHER THE DECREE OF THE DISTRICT COURT WAS FINAL FOR PURPOSES OF ENFORCEMENT TEN DAYS AFTER ITS ENTRY.

A.

No Attempt Has Been Made To Judicially Enforce The Judgment and Decree.

The petition seems to argue that the Court of Appeals held the judgment and Decree of the District Court was not enforceable ten days after entry. In order to create an apparent conflict between the various courts of appeals, it is necessary for Vroom to interpret the holding of the court below as meaning that the decree of the District Court was not enforceable until all appeals had been taken, or the time for taking them had lapsed. Nothing in any remark of either court below justifies such an interpretation. Rather, the Court of appeals said:

> Thus the appeal suspended the time for performance by the nurses of tendering payment for the shares of stock available to them through the imposition of the constructive trust on the Taylor stock. 481 F.2d 34, 40.

In this case a motion for a stay was denied and not appealed, and no attempt has been made to enforce the constructive trust through further judicial proceedings under Rule 70, Federal Rules of Civil Procedure. Thus it was not necessary for the Court of Appeals to rule upon the enforceability of this trust pending appeal. The nurses agree with Vroom that it is presently enforceable, and see nothing in the opinion of either court to the contrary. That no attempt was made to tender the purchase price while motions to alter the judgment were pending in the trial court or while an appeal was

pending in the Court of Appeals only reflected the nurses' belief that the time for tender began when the decree was final on appeal, and their disinclination to perform a useless act. It was not until a favorable decision had been rendered by the Court of Appeals that a tender was made, as will be noted hereinafter. The absurdity of Vroom's position can best be seen by the fact that he is arguing that the nurses should have tendered during the time while his motions were pending in the trial court to reverse its decision on the merits, or for a new trial. During this time, and during the appeal which followed, even if the nurses had held the stock, they could not have sold it, encumbered it, or voted it for a sale of all of the corporate assets or for liquidation, for to do so might have defeated the jurisdiction of the courts over the trust res. Such action certainly would have subjected them at least to injunctive relief, if not to contempt of the court in which the matter was pending. c.f. Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527 (1911).

B.

No Appeal Has Been Taken From the Denial of A Stay of Enforcement of the District Court's Decree Which Could Raise the Question of its Enforceability.

On June 5, 1972, Vroom moved the District Court for a stay of execution of or any proceedings to enforce the judgment. (App.i) After June 11, 1972, while this motion was still pending, Vroom did not suggest its mootness on the ground that the thirty days had expired. This motion was denied by the District Court on June 23, 1972. (App.v.) No appeal was taken from this order, and the Court of Appeals did not address itself to this matter, so that no decision has been brought before this Court which raises any question about when the judgment and decree of the District Court first became enforceable, as opposed to the question of when its enforceability expires, which is the precise and only question of this nature decided by either court below.

Vroom has attempted to reverse the posture of this case by arguing that if the judgment and decree of the District Court was enforceable ten days after entry, and its enforceability was not suspended by filing a supersedeas bond, then the time for tender must expire thirty days after entry of the judgment. Such an argument effectively amends the District Court's order to read "30 days after entry"; an amendment which Vroom argues that even the District Court had no power to make. Vroom's argument also seems to be that if the decree is held to be enforceable for 30 days after the final appeal, then the Court of Appeals must have held that it was not enforceable earlier. It should be noted that all of Vroom's analysis must proceed without one word of assistance from the opinion of either court below, since neither of them spoke to this proposition. Not only did neither court below so hold, but such an argument misses the historic distinctions between law and equity which are recognized in Rule 62, Federal Rules of Civil Procedure. This Court has long recognized that supersedeas is a common law writ which stays execution of a judgment at law, but which did not apply to a decree in equity, which was stayed by an appeal in England until 1772. **Hovey v. McDonald**, 109 U. S. 150 (1883).

That a supersedeas does not affect a decree in equity is obvious from Rule 62. Rule 62(d) provides that a stay may be obtained by an appellant by giving a supersedeas bond, subject to the exceptions contained in subdivision (a) of Rule 62.

The effect of an appeal on a proceeding in equity is not to stay the effect of the lower court's decree, whether granting or denying equitable relief, under Rule 62(c). Here no stay of the constructive trust was requested, and none granted, so it ramained in effect, **Hovey v. McDonald**, 109 U. S. 150 (1883); **Slaughter House Cases**, 10 Wall. (77 U. S.) 273 (1870), unless it terminated by its own terms. Indeed, even where a bill requesting injunctive relief has been dismissed, and an injunction granted pending appeal, it has been held that the injunction

continued after the appeal was dismissed without opinion, as long as the time for filing an application for rehearing had not expired, and the time for issuance of the Court's mandate had not run. **Merrimack River Savings Bank v. City of Clay Center**, 219 U. S. 427 (1911). In **Leonard v. Ozark Land Co.**, 115 U. S. 465 (1885), an injunction was granted by the trial court against cutting any trees or removing any staves from the land in question, and an appeal, which the Court noted operated as a supersedeas, having been taken, this Court affirmed the holding of the trial judge that the supersedeas did not suspend the effect of the injunction.

C.

Whether The Decree Was Enforceable Immediately Upon Its Entry Is Irelevant to the Question of When Its Enforceability Terminates.

The courts have uniformly held that whether a decree in equity is suspended or not by an appeal, or by filing a bond or obtaining a stay, the time within which performance of a condition must be tendered runs from the final resolution of the dispute.

A case similar to the present one is **Fenton v. Farmers' & Merchants' Nat. Bank**, 27 Tex. Civ. App. 231, 65 S.W. 199 (1901). There the bank was given the right to pay into the court for the benefit of its adversaries a certain sum within 90 days after the date of judgment and thus purchase certain realty interests from them; if, however, the bank did not pay within the time it would recover nothing. The parties prosecuted an appeal and the bank did not tender within 90 days of the date of the trial court's judgment. The bank's adversaries contended that the bond filed for appeal was only a cost bond, not a supersedeas bond. The court held that it was a supersedeas bond, and that it and the appeal suspended the finality of the trial court's judgment, but cited in its opinion **Texas Trunk Ry. Co. v. Jackson**, 85 Tex. 605, 22 S.W. 1030 (1893). The Opinion in that case by Chief Justice Stayton makes clear that the

nature of the bond does not affect 'finality' for purposes of performance of conditions:

> ". . . We are of opinion that appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives a judgment of that finality of character necessary to entitle it to admission in evidence in support of the right or defense declared by it, and from this necessarily follows the insufficiency of a plea in bar, based on it. That, under the statute, execution may be issued, and the judgment be inforced, during the appeal, when only a cost bond has been given, do not affect the question, for this is by virtue of the statute, which does not undertake to determine the status of the judgment in reference to any matter involved in the questions certified. 22 S.W. 1030, 1032.

This rationale was subsequently followed in **Dignowity v. Fly**, 110 Tex. 613, 210 S.W. 505 (1919):

> "In like manner, when a decree of the trial court expressly allows a party a certain time thereafter within which to perform an act, such time does not begin to run until denial of a writ of error, in cases where application therefor is made to this court. **Hume v. Moore**, 204 S.W. 382."

And see **Williams v. Waxahachie National Bank** 51 S.W. 2d 1073 (Tex. Civ. App. 1932).

In a great many cases the courts have either ignored entirely the question of whether the enforcement of the judgment was stayed pending an appeal, or have stated that whether a stay was in effect was irrelevant to the question of time for performance of a condition of the decree, **King v. King**, 2 Wash. App. 386, 468 P. 2d 464 (1970); **Fain v. McCain** 199 S.W. 889 (Tex. Civ. App. 1918); **Smith v. Chytraus**, 152 Ill. 664, 38 N.E. 911 (1894); **Borrow v. El Dorado Lodge**, 75 Ariz. 218, 254 P. 2d 1027 (1953); **Northwestern Wisconsin Elec. Co.**

v. Public Service Commission, 248 Wis. 479, 22 N.W. 2d 472 (1946). Thus Vroom's fundamental error is failure to recognize that "final" does not have a fixed and single meaning for all purposes; while it may be final for purposes of appeal and execution, it may not yet be final for purposes of terminating the litigation, collateral estoppel, or performance of a condition.

II.

THE INTERPRETATION OF THE DISTRICT COURT'S ORDER IS CONSISTENT WITH PRIOR JUDICIAL INTERPRETATIONS, NONE OF WHICH ARE DETERMINED BY WHEN A DECREE FIRST BECAME ENFORCEABLE.

The District Court, in impressing a constructive trust on shares of stock fraudulently acquired by Vroom, impressed it until 30 days after the judgment "becomes final." (emphasis added). The Court could have impressed it until 30 days from the date of entry of its Judgment and Decree, or until June 11, 1972. It did not do so, recognizing that further motions to the trial court or further appeals might leave the merits of this case, and the nurses' ultimate right to purchase the shares, unresolved for a substantial time. That Vroom recognized this is clear from the fact that in his motion to fix the amount of the supersedeas bond filed on June 26, 1972, no mention was made of any contention that the constructive trust had expired. (App.vi) It was only after several hearings where no suggestion of expiration of the constructive trust had been made, 179 days after entry of the District Court's Judgment and Decree, that Vroom finally suggested to the trial judge that the constructive trust had expired 149 days before.

The question raised in this case is only what the District Court meant when it gave the nurses 30 days to tender the purchase price for the fraudulently acquired shares from the date when the Judgment and Decree "becomes final." The District Court's interpretation of its own Judgment and Decree, aside from being obvious, is consistent with that of the majority

of courts which have granted equitable relief subject to performance of a condition precedent by the plaintiff. In none of these cases was it thought necessary to discuss the effect of the rules of procedure, since the language of the decree speaks for itself. Suspension or extension of the time for performance of a condition of a decree is analogous to the long-established Federal rule that a motion for new trial, for judgment n.o.v., to amend findings of fact or to alter or amend the judgment suspends the time allowed for taking whatever action is required by the rules to perfect an appeal, which is also a condition precedent to a right—that of being heard on the merits on appeal. Federal Rules of Appellate Procedure, Rule 4(a). This was the rule followed even before former Rule 73(a), Federal Rules of Civil Procedure, was amended in 1946 to expressly so provide, **United States v. Crescent Amusement Co.**, 323 U.S. 173, (1944); **Leishman v. Associated Wholesale Electric Co.**, 318 U.S. 203, (1943), and before the adoption of the Federal rules of Civil Procedure, **Morse v. United States**, 270 U.S. 151, 153-54, (1926), and cases cited.

That the District Court's meaning was obvious to those who were before it at the time of its entry is best evidenced by the fact that it took Vroom 149 days to suggest to the District Court that the time for performance of its decree had already expired—time during which Vroom attempted to obtain a stay of enforcement which would have been entirely unnecessary had he taken this position earlier. Indeed, to this date, Vroom has cited no cases involving an equitable decree awarding relief only after performance of a condition precedent by the plaintiff.

Numerous cases hold that an appeal suspends the time allowed by the judgment for the performance of a condition affecting the substantive rights of the parties, so the party who is to perform the condition has the specified time for its performance from the time that the judgment or order of the appellate court becomes effective. See 4 Am.Jur.2d, Appeal and

Error, § 363 (1962), and annotation, 28 A.L.R. 1029 (1924) and cases cited. The rule has been consistently applied in **King v. King**, 2 Wash. App. 386, 468 P.2d 464, 466-67 (1970) (time for performance of a condition in a divorce decree dividing property); **City of Vernon v. Superior Court**, 38 Cal. 2d 509, 241 P.2d 243 (1952) (time for performance of condition in decree abating a nuisance); **Uthoff v. Thompson**, 176 La. 599, 146 So. 161 (1933), and **Fain v. McCain**, 199 S.W. 899 (Tex. Civ. App. 1918) (time for payment to defendant for value of improvements in a quiet title action); **Smith v. Chytraus**, 152 Ill. 664, 38 N.E. 911 (1894) (time for payment in order to receive a certificate of purchase to land); **Ricard v. Gollen**, 91 Ida. 335, 421 P.2d 130 (1966) and **Borrow v. El Dorado Lodge**, 75 Ariz. 218, 254 P.2d 1027 (1953) (time to comply with order of remitter); **Northwestern Wisconsin Elec. Co. v. Public Service Commission**, 248 Wis. 479, 22 N.W.2d 472 (1946) (time for payment of purchase price for property being acquired in eminent domain); and in a variety of contract and bond cases making a payment mandatory on "final judgment": **Wolfer v. Hurst**, 47 Ore. 156, 80 P. 419 (1905); **Roberts v. Central Mutual Ins. Co.**, 285 Ill. App. 408, 2 N.E.2d 132 (1936) and **Dean v. Marshall**, 90 Hun. 335, 35 N.Y. Supp. 724 (1895). And the term "final judgment" has been so interpreted in numerous statutes: **Carroll Elec. Co. v. Snelling**, 62 F.2d 413 (1st Cir. 1932) (time for proving claims against a bankrupt's estate); **Farquharson v. Fresno Oil Co.**, 9 F.2d 515 (8th Cir. 1925) (statute of limitations for bringing suit on foreign judgments); **In re Metcalf**, 17 Fed. Cas. 172 (No.9, 494) (S.D.N.Y. 1867) (prohibition against prosecuting claims provable in bankruptcy court to final judgment elsewhere as applied to prosecuting an appeal); **Twin Ports Oil Co. v. Pure Oil Co.**, 26 F. Supp. 366 (D. Minn. 1939) and **International Shoe Mach. Corp. v. United Shoe Mach. Corp.**, 315 F.2d 449 (1st Cir. 1963), **certiorari denied**, 375 U.S. 820 (1963) (actions under Sec. 5 of Clayton Act based upon prior final judgment of antitrust violation in criminal

antitrust cases). Indeed, in at least one such situation, Congress has codified this sensible rule that a judgment is not truly final until the time has run for appeals, and has provided that a judgment in one United States District Court may not be registered in another District Court until it ". . . has become final by appeal or expiration of time for appeal . . ." 28 U.S.C. § 1963. And in criminal cases, where a timely motion for new trial is jurisdictional, the courts have held that an appeal suspends the time for filing such a motion to two years from the affirmance of the conviction. **Casias v. United States**, 337 F.2d 354 (10th Cir. 1964); **United States v. Chisum**, 436 F.2d 645 (9th Cir. 1971); **Smith v. United States**, 283 F.2d 607 (D.C.Cir. 1960); certiorari denied 364 U.S. 938 (1961); **United States v. Granza**, 427 F.2d 184 (5th Cir. 1970).

III.

THE DISTRICT COURT DID NOT AMEND ITS OWN ORDER AFTER SATISFACTION OF THE JUDGMENT.

The only motion to alter or amend the judgment of the District Court which was filed in this case was by Vroom, who argued that it had been satisfied by a lapse of time. The motion was denied. No order has ever been entered altering the terms of the judgment and decree herein. To take an interpretation of that decree which happens not to agree with one's own interpretation (which was not urged upon the trial court for nearly six months after its entry) and to call it a modification of the judgment is sophistic. In **Leonard v. Ozark Land Co., supra**, 115 U.S. 465 (1885), where an injunction had been granted by the trial court against "cutting or removing any trees, logs or timber, or any staves manufactured from any trees or timber" upon the land in question, the trial court, in allowing an appeal which operated as a supersedeas, directed that it should "not operate to suspend or affect so much of the decree * * * as enjoins the defendants . . ." 115. U.S. at 465.

The opinion, addressing itself to the question of whether the subsequent ruling of the trial court was an enlargement of the injunction, stated:

> ". . . the order made by the judge when he allowed the appeal is in reality nothing more than notice to the appellant that such was the effect of his decree. It was not, and was not intended to be, an enlargement of the original scope of the injunction, but, under the circumstances, a justifiable precaution against a possible misunderstanding by the appellant of the extent and effect of the decree appealed from." 115 U.S. at 468.

Where the trial court's remarks were, as here, nothing more than a justifiable interpretation of an existing decree, and the interpretation is consistent with a common understanding of the words, and common sense under the circumstances, it can hardly be called an amendment. And many courts have distinguished between "final judgment for purposes of appeal" which is akin to what petitioner here urges, and "final judgment for purposes of terminating the litigation between the parties." In **Dean v. Marshall**, 90 Hun. 335, 35 N.Y. Supp. 724, 725 (1895), where the court was asked to determine the meaning of "final judgment" in a stipulation between the parties, the opinion noted:

> "The term is susceptible of two other significations,—one, which, in a strict legal sense, is its true meaning, viz. a determination of the rights of the parties after a trial, whether such is the subject of review or not; and the other, its colloquial use or signification, which makes it synonymous with 'decisive' or a judgment that cannot be appealed from, and which is perfectly conclusive upon the matter adjudicated."

To the same effect are **Roberts v. Central Mutual Ins. Co.**, 285 Ill. App. 408, 2 N.E.2d 132, 134 (1936), and **Wolfer v. Hurst**, 47 Ore. 156, 80 Pac. 419, 420 (1905). In **Northwestern Wisconsin Elec. Co. v. Public Service Commission**, 248 Wis. 479, 22 N.W.2d 472, 474 (1946), in discussing when a commission order requiring a village to pay a condemnation award "within four months from the effective date of this order" had expired,

where an appeal extended several years after the order, the court stated:

> "It is, of course, not for this court to redraft orders of the commission in order to conform them to some unexpressed intent of the commission. We must find language in the order that will accommodate itself to the intention which we ascribe to the order. In this case, the term 'final judgment' must be capable of being taken in such a sense. The term will, of course, accommodate itself to the contentions of the plaintiff. In many situations the term 'final judgment' does refer to that judgment in the lower court which terminates proceedings there and that this is true is so well known and so long established that we shall not labor the point or attempt any documentation of it. However, this is not the only sense in which the term 'final judgment' can be taken. In Bipler's Appeal, 59 Cal. 550, it is pointed out that while the term 'final' is frequently used in connection with the word 'judgment' to distinguish from interlocutory orders or judgments in the same court, the term 'final judgment' also describes a determination effective to conclude further proceedings in the same cause by an appeal or otherwise. [citations omitted] This meaning can be attributed to the term 'final judgment' more easily in cases where a period of time within which to act is limited to run from a final judgment."

Clearly it is not straining the meaning of the words "final judgment" in the District Court's order to interpret the time as running from the final determination of the parties' rights herein, when the tender will no longer be a futile act.

IV.
THE ISSUE OF TIMELINESS OF TENDER IS MOOT WITH RESPECT TO THREE OF THE RESPONDENTS.

On July 27, 1973, tender of cashier's checks in amounts sufficient to satisfy the decree of the District Court was made to Vroom personally by respondent's counsel on behalf of

Marguerite Irwin, Lois McCaleb and June M. Lease, respondents herein. The tender was accompanied by a letter of the same date, which gave Vroom until July 28, 1973 to accept or reject the tender. Because counsel for respondents had been unable to contact Vroom's counsel by telephone prior to making such tender, the time for accepting or rejecting the tender was orally extended to Monday, July 30, 1973. This tender was made within 30 days of the order of the Court of Appeals dated June 29, 1973. On August 3, 1973, tender was made on behalf of Julia G. Crowley, pursuant to a letter of even date, hand delivered to Vroom. No indication of rejection of the July 27 tender was given by Vroom by July 30, and Vroom continues to hold funds represented by cashiers' checks from Ms. Lease, Ms. Irwin and Ms. McCaleb for the purchase price for the shares subjected to the constructive trust. Only by letter dated August 7, 1973, did Vroom's counsel attempt to vary the terms of the tender Vroom had previously accepted. (App.vii) In that letter counsel for Vroom, as an excuse for non-delivery of stock certificates to the respondents Irwin, Lease and McCaleb, noted the appeal taken from the District Court's order and the pendency of a petition for rehearing in the Court of Appeals—obviously a contention that there was not yet a final judgment of the District Court to be obeyed, or if there was, that its effect was suspended during the course of this appeal.

It is obvious that Vroom cannot have it both ways—insisting here that the judgment of the District Court expired by its terms over a year ago, despite the contrary ruling of two courts below, and at the same time insisting to respondents that the effectiveness of that order is suspended by appeals, so that it need not be obeyed. It is clear that a tender has been accepted, and that petitioner has a duty to deliver stock certificates to three of the respondents from whom he has accepted money, and that the appeal is moot as to them.

The law is well settled that "A creditor must accept or reject a tender as it is made; he cannot make his acceptance

conditonal or qualified by prescribing the terms of his acceptance." 52 Am. Jur. Tender § 27 (1947). And see **Avery v. Schuman Co.**, 159 F. Supp. 906 (S.D. Calif. 1958); **Mumm v. Taylor**, 121 Colo. 157, 213 P.2d 836 (1950); **State ex rel. Attorney General v. Mize**, 204 Miss. 886, 36 So.2d 143 (1948); **Clasen v. Moore Bros. Realty Co.**, 413 S.W.2d 592 (Mo. App. 1967); **Swain v. Kayko**, 44 Mich. App. 496, 205 N.W.2d 621(1973); **Emerson v. Treadway**, 270 S.W.2d 614 (Mo. App.1954); **Equitable Life Assur. Soc. v. Brandt**, 240 Ala. 260, 198 So. 595. 134 A.L.R. 555(1940)

CONSLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

William J. Carney
University of Wyoming
College of Law
P.O. Box 3035
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J. D. Muller
The Wheeler Opera House
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[APPENDIX]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, JUNE M. LEASE, JULIA G. CROWLEY, and LOIS M. McCALEB, individually and on behalf of themselves and all other stockholders of the WEST END DEVELOPMENT COMPANY, a Colorado corporation,

Plaintiffs,

vs.

WEST END DEVELOPMENT COMPANY, a Colorado corporation; Donald C. SABIN and MARIELLEN B. POWERS, Directors of the WEST END DEVELOPMENT COMPANY, and ROY VROOM, individually, and as President and Director of the WEST END DEVELOPMENT COMPANY,

Defendants.

MOTION TO STAY EXECUTION OF OR ANY PROCEEDINGS TO ENFORCE JUDGMENT

Defendants, by their attorneys, Helmick, Conover & Burkhardt, move the Court, pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, for an Order staying the execution of or any proceedings to enforce the judgment entered herein on May 11, 1972 pending the disposition of Defendants' Motion for New Trial or in the Alternative for

Amended Findings and Judgment and for a period of 30 days from the date the judgment becomes final; and

As grounds for said Motion Defendants state as follows:

1. The Judgment and Decree entered herein on May 11, 1972 included the impression of a constructive trust upon 30.76 shares of stock of West End Development Co. owned by Defendant Roy Vroom and was conditioned upon a tender by Plaintiffs of the purchase price for said shares of stock, said tender to be made within 30 days from the date the judgment becomes final.

2. Defendants have filed a Motion for New Trial or in the Alternative for Amended Findings and Judgment, and submit that the judgment of this Court is in error and should be amended or a new trial grated.

3. In the event that said Motion of Defendants is not granted, Defendants intend to file a Notice of Appeal, file a supersedeas bond and take such other steps as are necessary to perfect an appeal to the United States Court of Appeals for the Tenth Circuit.

4. Accordingly, Defendants submit that a stay of execution of the judgment herein pending the disposition of Defendants' Motion for New Trial and for a period of 30 days from the date the judgment becomes final is appropriate and necessary under the circumstances.

HELMICK, CONOVER & BURKHARDT

By /s/Frederic K. Conover II
Attorneys for Defendants
700 Denver Club Building
Denver, Colorado 80202
Telephone: 292-9450

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER AMENDING
	)	FINDINGS OF FACT
WEST END DEVELOPMENT	)	AND DENYING
COMPANY, et al.,	)	MOTION FOR NEW
	)	TRIAL
Defendants.	)	

Defendants have filed a motion for new trial or in the alternative for amended findings and judgment. The parties have filed a written waiver of oral argument of this motion, and the Court has reconsidered its findings. The findings of fact are amended as follows:

The sentence appearing on page 11 of the Court's memorandum opinion reading:

> "Less than four months after the June 4, 1969, resolution, another resolution signed by Vroom as president and Powers as secretary [Sabin apparently didn't participate in the meeting] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security."

is amended to read:

> "Less than four months after the June 4, 1969, resolution, another resolution signed by Vroom as president and

> Powers as secretary [Sabin did not sign these minutes] authorized the borrowing of $75,000.00 from the Bank of Aspen with the tennis court site to be encumbered as security."

The sentence commencing at the bottom of page 11 of the Court's memorandum reading:

> "Not all of the remaining loan proceeds of $32,654.85 can be said to have been 'used to improve the tennis club site further,' because on March 23, 1970, Vroom and Powers voted [Sabin was not present] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, . . ."

is amended to read:

> "Not all of the remaining loan proceeds of $32,654.85 can be said to have been 'used to improve the tennis club site further,' because on March 23, 1970, Vroom and Powers voted [Sabin did not sign the minutes] to spend $15,000.00 of the loan proceeds to pay Vroom a $15,000.00 per year salary, retroactive to March 15, 1969, . . ."

The language appearing on page 28 of the Court's memorandum reading:

> "Nor, unless Vroom can escape under the provisions of Article VII of the Articles of Incorporation, was there a quorum of directors who voted the salary. It is to be remembered that only Vroom and his personal secretary authorized the $15,000.00 salary, and under general principles of Colorado corporation law, Vroom wasn't eligible to vote."

is amended to read:

> "Although not necessary to the decision in this case, we

comment that unless Vroom can escape under the provisions of Article VII of the Articles of Incorporation it is doubtful that a quorum of directors voted the salary—at least only Vroom and his secretary signed the minutes—and under general principles of Colorado corporation law, Vroom wasn't eligible to vote."

With these amendments to the findings of fact, the motion for new trial and for other amendments to the findings is denied. Defendants' motion for a stay of execution is denied; provided, however, that if defendants take an appeal, they may obtain a stay by giving a supersedeas bond in accordance with the provisions of Rule 62 (d).

Dated at Denver, Colorado, this 23rd day of June, 1972.

/s/Fred M. Winner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-2941

MARGUERITE IRWIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO FIX
	)	AMOUNT OF
WEST END DEVELOPMENT COMPANY, et al.,	)	SUPERSEDEAS BOND
	)	
	)	
Defendants.	)	

Defendants, by their attorneys, Helmick, Conover & Burkhardt, move the Court to fix the amount of a Supersedeas Bond to be filed herein, and submit to the Court that it would be reasonable and proper to fix said bond at the amount of $27,362.37. Said amount represents the total of the Court's judgment for $15,048.75 plus interest since March 23, 1970 at the rate of 6%, the Court's judgment against Defendant Vroom for $3,128.24 plus interest at 6% since March 26, 1970, and the amount of the Court's judgment against West End Development Company for $5,000.00 plus interest at 6% from May 11, 1972, as well as the sum of $250.00 to cover costs herein and to serve in lieu of a cost bond plus interest on the amount of the judgment at 6% until May 31, 1973.

HELMICK, CONOVER & BURKHARDT.

By /s/Frederic K. Conover II
Attorneys for Defendants
700 Denver Club Building
Denver, Colorado 80202
Telephone: 292-9450

August 7, 1973

William J. Carney, Esq.
Attorney at Law
P. O. Box 3136
Aspen, Colorado 81611

Re: Irwin, et al. v. West End
Development Company, et al.

Dear Mr. Carney:

We have tried unsuccessfully to reach each other by telephone in the past week and I shall be our of town most of the coming week.

Mr. Vroom has requested that we acknowledge receipt of your letter of July 27, 1973, which letter you hand-delivered directly to him with what must be considered as a somewhat questionable request for him to sign the letter on the second page. You did not, of course, consult with us by telephone or in writing prior to making direct personal contact with Mr. Vroom.

In any event, your letter of July 27, 1973 is acknowledged as being received. We also acknowledge that under the terms of that letter you have attempted to make certain tenders of payment, although we do not admit that the tender was made in accordance with the judgment and decree of the U.S. District Court of Colorado on May 11, 1972, nor do we, of course, in any way concede that the judgment and decree of that Court was proper. As you know, we have appealed that judgment and decree to the Court of Appeals for the Tenth Circuit and although an opinion was issued from that Court some weeks ago, there is presently pending a Petition for Rehearing.

Nevertheless, please be assured that our clients intend to comply, to the extent of their ability to do so, with any judgment and decree of the courts. Accordingly, to the extent

that your letter of July 27, 1973 may be in conformance with any court order which is not modified or altered in the future, our clients will do everything within their power to comply with those orders and accept the checks of Colonel McCaleb and Majors Irwin and Lease, subject to any such modification, alteration or reversal.

However, you and your clients should be specifically advised that any purported offer of tender on behalf of Major Rock is considered as not in compliance with any valid court order, nor in compliance with any rights which Major Rock may have. We are, accordingly, instructing our clients to return to you forthwith the Rock cashiers check.

In the future, we would appreciate all communications regarding this matter to be made directly with the undersigned and not with Mr. Vroom. If we are unable to reach each other by telephone, kindly try to reach us by letter.

Very truly yours,

HELMICK. CONOVER & BURKHARDT

By /s/Frederic K. Conover II

(Dictated by Mr. Conover on
August 4, 1973)

FKC:slc
cc: Mr. Roy A. Vroom